

Braganza: A Failed Domestic Transplant?

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ABSTRACT

In *Braganza v BP Shipping*, the Supreme Court confirmed that some powers under a contract were subject to an implied term which required them to be exercised in a manner compliant with the *Wednesbury* test familiar to all public lawyers. In particular, this meant that any use of such a power could only be made after considering all relevant factors and disregarding all irrelevant factors.

This paper first analyses the conceptual basis of the implied term in *Braganza*. It concludes that the duty to act rationally is implied by law, regardless of party intention, where a discretion is limited to finding or evaluating facts, and implied in fact in all other cases. It then assesses the wisdom of transplanting *Wednesbury* wholesale into Contract Law, especially given the contextually flexible approach to the intensity of rationality review in modern Administrative Law. Two underlying points of difference between the systems require some adjustment to the *Wednesbury* test as applied to contractual cases: first, Contract Law's general acceptance of a party acting in pure self-interest, and second, Contract Law's preference for clear rules to govern parties' primary obligations in contrast to Administrative Law's use of flexible standards. Given these differences, the scope for variable intensity review in Contract Law should be limited to two categories of case: first, where an additional implied term exists that a contractual discretion only be exercised for a specific purpose, and secondly, where the power in question is a power to find or evaluate facts.

Table of Contents

INTRODUCTION.....	9
CHAPTER I – SETTING THE SCENE: BRAGANZA, WEDNESBURY, IMPLIED TERMS AND GOOD FAITH.....	12
A. The Braganza Case	12
B. <i>Wednesbury</i> irrationality, reasonableness, and Administrative Law’s search for principle ..	19
1. The original test in <i>Wednesbury</i>	20
2. Rationality in the 21 st Century.....	23
C. The <i>Braganza</i> duty in the High Court.....	27
1. The Gateway Question: When Does <i>Braganza</i> Apply?	28
<i>a. Weak discretion – Braganza easily implied.....</i>	<i>32</i>
<i>b. Strong discretions and ‘absolute contractual rights’ – a less predictable analysis.....</i>	<i>38</i>
<i>c. Shurbanova – weak and strong side by side</i>	<i>43</i>
<i>d. The Braganza duty - implied in fact or in law?.....</i>	<i>43</i>
2. What does review look like when <i>Braganza</i> does apply?.....	51
<i>a. Intensity of review</i>	<i>52</i>
<i>b. Reasoning process.....</i>	<i>57</i>
D. Descriptive Conclusions.....	61
CHAPTER II – SHOULD INTENSITY OF REVIEW UNDER <i>BRAGANZA</i> BE VARIABLE OR FIXED?	61
A. The Different Ethics of Contract Law and Administrative Law	63
1. The Different Approaches to Good Faith and Self-Interest in Contract Law and Administrative Law.....	64
2. Contract’s Preference for Rules or Very Clear Standards in Ascertaining Primary Obligations	66
<i>a. Rules v Standards generally</i>	<i>66</i>
<i>b. Concrete Examples of Rules and Standards in Contract Law and Administrative Law</i>	<i>68</i>
<i>c. Practical concerns.....</i>	<i>76</i>
<i>(i) Limitation</i>	<i>76</i>
<i>(ii) Termination</i>	<i>77</i>
d. Unpredictability in the Case Law.....	77
B. Implications for <i>Braganza</i>.....	79
1. Certainty in Contract Law Does Not Justify Overruling <i>Braganza</i>	79
2. However, Certainty Does Justify Fewer Variations in Intensity of Review	81
a. Variable intensity?.....	82
<i>(i) Commercial versus relational contracts.....</i>	<i>82</i>
<i>(ii) Institutional Competence</i>	<i>85</i>
<i>(iii) Caveat.....</i>	<i>87</i>
C. Discretion for a particular purpose.....	88

D. Weak discretion.....	97
E. Conclusions	102
CONCLUSION	103
<i>Bibliography</i>	<i>106</i>

Cases

Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The “Product Star”) (No 2) [1993] 1 Lloyd’s Rep 397.....	15
Arnold v Britton [2015] UKSC 36, [2015] 2 WLR 1593.....	39, 49
Assicurazioni Generali SpA v Arab Insurance Group [2002] EWCA Civ 1642, [2003] 1 WLR 577	101, 102
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.....	passim
Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10.....	28, 44
BHL v Leumi [2017] EWHC 1871 (QB).....	50
Blyth v Birmingham Waterworks Co (1856) 11 Ex 781.....	66
Braganza v BP Shipping [2013] EWCA Civ 230.....	13, 14, 15, 58
Braganza v BP Shipping [2015] UKSC 17, [2015] 1 WLR 1661.....	passim
British Telecommunications Plc v Telefónica O2 UK Ltd [2014] UKSC 42, [2014] Bus LR 76 15, 49	
Brogden v Investec Bank Plc [2014] EWHC 2785 (Comm).....	30, 32
Butler Machine Tool Co Ltd v Ex Cell-O Corp [1979] 1 All ER 965.....	69
Byrne v van Tienhoven (1880) 5 CPD 344.....	69
Cavendish Square BV v Makdessi, ParkingEye v Beavis [2015] UKSC 67.....	69
Chapell v Nestle [1960] AC 87 (HL).....	67
Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101.....	39
Commerzbank v Keen [2006] EWCA Civ 1536.....	40
Compass Group UK Ltd v Mid Essex Hospital Services NHS Trust [2013] EWCA Civ 200.....	37
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (HL).....	19, 22
Crossley v Faithful & Gould Holdings Ltd [2004] EWCA Civ 293.....	45
Dwyer UK Franchising Ltd v Fredbar [2021] EWHC 1218 (Ch).....	36
Dymoke v Association for Dance Movement Therapy UK Ltd [2019] EWHC.....	101
Education Secretary v Tameside BC [1977] AC 1014 (HL).....	101
Equitas Insurance Ltd v Municipal Mutual Insurance Ltd [2019] EWCA Civ 718.....	48, 51
Faieta v ICAP [2019] EWHC 2995 (QB).....	57
Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22, [2003] 1 AC 32.....	48
Federal Republic of Nigeria v JP Morgan Chase Bank NA [2019] EWHC 347 (Comm), [37.....	51
Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] EWCA Civ 1047, [2001] 2 All ER (Comm) 299.....	15, 42
George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 AC 803.....	70, 72
Hadley v Baxendale (1854) 156 ER 15.....	70
Hayes v Willoughby [2013] UKSC 17, [2013] 1 WLR 935.....	15
Henthorn v Fraser [1892] 2 Ch 27.....	69
Hong Kong Fir Shipping v Kawasaki [1962] 2 QB 71 (CA).....	69
Jacobellis v Ohio (1964) 378 US 184.....	80
Jones v First-tier Tribunal [2013] UKSC 19.....	72
Kwik Lets v Khaira [2020] EWHC 616 (QB).....	37
Lawrence v Texas, (2003) 539 US 558.....	9
Lehman Bros International (Europe) Ltd v ExxonMobil Financial Services BV [2016] EWHC 2699 (Comm).....	37
Limbu v Secretary of State for the Home Department [2008] EWHC 2261 (Admin).....	75
Lomas v JFB Firth Rixson [2012] EWCA Civ 419.....	40
Ludgate Insurance Co Ltd v Citibank NA [1998] Lloyd’s Rep IR 221.....	15
Lymington Marina Ltd v McNamara [2007] EWCA Civ 151.....	90, 96, 97
Mandalia v Secretary of State for the Home Department [2015] UKSC 59.....	72, 74
Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, [2016] AC 742.....	passim

Monde Petroleum SA v WesternZagros Ltd [2016] EWHC 1472 (Comm)	77
Monk v Largo Foods Ltd [2016] EWHC 1837 (Comm)	77
Moyna v Secretary of State for Work and Pensions [2003] UKHL 44, [2003] 1 WLR 1929	72
Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 1363	61
Padfield v Minister for Agriculture [1968] AC 997 (HL)	90
Paragon Finance Plc v Nash and Staunton [2001] EWCA Civ 1466.....	53
Property Alliance Group v RBS [2018] EWCA Civ 355, [2018] 1 WLR 3529	54
R (Campaign Against Arms Trade) v Secretary of State for International Trade [2019] EWCA Civ 1020.....	25
R (Cart) v Upper Tribunal 2011 UKSC 28	74
R (Justice for Health) v Secretary of State for Health [2016] EWHC 2338 (Admin).....	74, 75
R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69.....	29
R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245.....	75
R (Privacy International) v IPT [2019] UKSC 22.....	74
R (Wells) v Parole Board [2020] EWHC 2710 (Admin)	26
R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213 (CA)	72
R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696 (HL).....	23
R v Secretary of State for the Home Department, ex parte Bugdaycay [[1987] AC 514 (HL)	23
R v Woollin [1999] 1 AC 82 (HL).....	55
Reid v Rush & Tompkins Plc [1990] 1 WLR 212	45
Shirlaw v Southern Foundries Ltd [1939] 2 KB 206 (CA)	28, 46
Shurbanova v Forex [2017] EWHC 2133 (QB).....	37, 43
Smith v Hughes (1871) LR 6 QB 597.....	69
SNCB Holding v UBS [2012] EWHC 2044 (Comm),	64
Societe Generale v Geys [2012] UKSC 63	77
Socimer International Bank Ltd v Standard Bank London Ltd [2008] EWCA Civ 116, [2008] Bus LR 1304.....	15, 46
Solle v Butcher [1950] 1 KB 671 (CA)	69
TAQA Bratani Ltd v Rockrose UKCS8 LLC [2020] EWHC 58 (Comm).....	28, 29, 38, 39
The Alaskan Trader [1984] 1 All ER 129 (CA).....	69
The Great Peace [2002] EWCA Civ 1407, [2002] 3 WLR 1617.....	69
The Moorcock (1889) 14 PD 64.....	28, 42, 46
The Vainqueur Jose [1979] 1 Lloyd's Rep 557.....	16, 101
Timeload Ltd v British Telecommunications plc [1995] EMLR 459.....	77, 91
Timeload Ltd v British Telecommunications Plc [1995] EMLR 459	40
TSG Building Services Plc v South Anglia Housing Plc [2013] EWHC 1151 (TCC),.....	77
UK Acorn Finance Ltd v Markel UK Ltd [2020] EWHC 922 (Comm), [2020] 1 CLC 632. 34, 35, 42, 48	
UTB v Sheffield United [2019] EWHC 2322 (Ch).....	40
Walford v Miles [1992] 2 AC 128	65
Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District [2021] SCC 7.....	50
Watson v Watchfinder [2017] EWHC 1275 (Comm), [2017] Bus LR 1309	58
Western Fish Products Ltd v Penwith DC [1981] 2 All ER 204 (CA)	72
White and Carter v MacGregor [1962] AC 413 (HL)	64, 69
Statutes	
Arbitration Act 1996, ss. 67-71	45
CPR 52.21(1-3)	97
Judicial Review and Courts Act 2022, s. 2.....	71
Local Government Act 1972, s. 1(11)	19
Sunday Entertainments Act 1932, s. 1(1)	19
Tribunals, Courts and Enforcement Act 2007, s 13.....	71

INTRODUCTION

The conventional definition of a legal transplant involves the adoption of a foreign legal concept by a jurisdiction different from the one in which the concept originated.¹ Examples include the gradual adoption of Roman Private Law by most of the European Continent,² English law's wholesale adoption of French rules governing servitudes into the common law on easements,³ and the adoption by the Supreme Court of the United States of a general right to privacy, borrowing heavily from the jurisprudence of the European Court of Human Rights.⁴

Common to all these examples is an international element. A rule in one country is copied by another. Sometimes the borrowing of a concept by one country has good results.⁵ But a legal transplant can equally lead to unintended consequences in the law of the "donee jurisdiction"⁶ if the rule is transplanted without regard to the wider legal, cultural, and procedural background of the donee state. When this happens, the transplant has failed.

This thesis is not concerned with the transplant of a rule or principle between two countries, as all the examples just cited were. Instead, it is concerned what Himsworth has recognised as a domestic transplant,⁷ namely the Supreme Court's decision in *Braganza v BP*

¹ M Graziadei, *Comparative Law, Transplants, and Receptions*, in Zimmermann and Reimann (eds), *The Oxford Handbook of Comparative Law*, 2d ed (OUP 2009) 443, 444.

² *Ibid*, 446-7.

³ AWB Simpson, "The Rule in *Wheeldon v Burrows* and the Code Civil (Varuhas, Three Issues in the Law of Contractual Discretion)" [1967] LQR 240

⁴ *Lawrence v Texas*, (2003) 539 US 558, 576-7 (per Kennedy J)

⁵ R Ginsburg, "A decent Respect to the Opinions of Humankind: The Value of Comparative Perspective in Constitutional Adjudication" (2005) 99 Proceedings of the American Society of International Lawyers Annual Meeting 351

⁶ *Ie* the jurisdiction which "receives" the foreign law.

⁷ C Himsworth, "Transplanting Irrationality from Public to Private Law" (2019) 23 *Edinburgh LR* 1

*Shipping*⁸ to adopt public law's *Wednesbury* test⁹ to the review of discretions granted by a contract. Although the test has been refined since then, the *Wednesbury* test as initially formulated had three basic prongs. A court would interfere with a decision taken by a public body if

- a) The decision maker considered something which was irrelevant;
- b) The decision maker failed to consider something which was relevant; or
- c) The decision maker reached a decision that was so unreasonable that no reasonable person could have reached it.

In *Braganza*, this three-pronged approach was adopted by the UK Supreme Court for the review of exercises of discretion under a term of a contract which allows one party to make a decision which affects the other. In *Braganza* itself, the defendant was given the power to decide whether an employee's death was caused by suicide or not. All five Justices were agreed that, in making this decision, the defendant was required to consider all relevant matters and disregard all irrelevant matters, and had to reach a conclusion that was reasonable in the sense that a reasonable person might have made it. In doing this, the Supreme Court, rather than crafting a new set of bespoke rules for the exercise of contractual discretion, borrowed a well-developed set of rules from another part of the legal system. Administrative Law principles would now apply in Contract Law, too.

In this thesis we will see that the *Braganza* transplant may yet suffer from the same problems that can affect transplants of legal rules between countries. It is clear that many of the ramifications of using a rule developed (and which has since been refined) in Administrative law

⁸ *Braganza v BP Shipping* [2015] UKSC 17, [2015] 1 WLR 1661

⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 233-234

to deal with disputes arising from a contractual discretion have not been fully thought through, and that this may lead to difficulty further down the line.

This thesis will begin, in Chapter I, with a review of the decision in *Braganza*, referring both to the range of matters that may be remitted to a contractual discretion, and the previous case law on which the Supreme Court built, in order to justify use of the *Wednesbury* criteria in the contractual context. This Chapter will also explain the decision in the *Wednesbury* case, and how the test set forth there has evolved several times over in the past fifty years. Having looked to the past, it will then continue by exploring how the *Braganza* decision has been approached by the lower courts in order to ascertain the decision's impact in practice. A strong account will be provided of the decisions in both *Braganza* and *Wednesbury* and how those decisions have been approached since by courts seeking to apply them.

Chapter II focuses on whether, in the contractual context, account should be taken not just of the *Wednesbury* criteria, as initially formulated, but also the more nuanced way in which control of administrative decision-making takes place in modern public law. The general argument will be that, whilst the decision in *Wednesbury* can be transplanted into the control of contractual discretion, much of the case law which has followed in Administrative Law, advocating a scaled approach to reasonableness review cannot, given contract law's general hostility towards good faith and vague standards. In addition, courts should exercise caution when deciding whether to borrow other Administrative Law concepts to control contractual discretion, such as improper purpose without considering whether contract law already has a good solution.

CHAPTER I – SETTING THE SCENE: BRAGANZA, WEDNESBURY, IMPLIED TERMS AND GOOD FAITH

This Chapter will set the scene by looking at each of the decisions in *Braganza* and *Wednesbury* separately, in parts A and B respectively. In part C, the thesis will build on this by seeking to establish where the *Braganza* duty has been held to apply to impose controls on the exercise of discretion, and where not, compared with the wider array of cases to which *Wednesbury* applies.¹⁰ This aspect of the thesis will show that there are really two streams of cases on the control of contractual discretion emerging at first instance, namely:

- (i) cases (such as *Braganza* itself) where discretion is limited to the contractual decision-maker deciding whether a particular state of affairs existed; and
- (ii) cases involving a wider discretion, where the decisionmaker is given a broad power to do (or not do) something.

It is hoped to demonstrate that the courts are much more willing to imply a *Braganza* duty into a contract in situation (i) than situation (ii). It will also be established here that the standard of review under *Braganza* appears to be a variable one (just as is the case in the modern application of *Wednesbury*), with fact-finding powers the regular subject of more exacting judicial scrutiny. In part D, the threads of the chapter will be drawn together, serving as a springboard for the more normative discussion that will follow in Chapter II.

A. The *Braganza* Case

¹⁰ Indeed, it is now rare that there is no control of administrative discretion; as we will see, the main debate in administrative law is about making *Wednesbury* review more exacting, rather than saying that there are cases where no control on discretion should apply at all.

Mr Braganza was an engineer who worked for BP on an oil tanker. His employment contract stipulated that, should he die whilst employed by BP, his “Nominated Beneficiary” (in this case, his widow) would ordinarily recover a death benefit to the tune of three times his annual salary.¹¹ But a term of the contract – Clause 7.6.3 – prevented BP from being required to pay out a death benefit if they thought that Mr Braganza’s death was caused (inter alia) by suicide. The clause said:

‘7.6.3 For the avoidance of doubt 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, or if the death, accidental injury or illness originated from a condition which was deliberately concealed or pre-existing at the time of commencement of employment or prior to joining the Vessel’.¹² (emphasis added).

Thus, the Contract stated that death benefits would be payable unless BP formed the opinion that death was caused by Mr. Braganza’s wilful act - namely suicide. As Lady Hale put it:

‘It is not the task of this [...] court determining a claim under such a contract to decide what actually happened to Mr Braganza. The task of the court is to decide whether his employer was entitled to form the opinion which it did.’¹³

¹¹ *Braganza v BP Shipping* [2013] EWCA Civ 230 11 [3] (Longmore LJ)

¹² *Ibid*

¹³ *Braganza* n8 [, [2]

Mr Braganza disappeared during a voyage between Sweden and New York. He was presumed dead, having gone overboard. If BP concluded that Mr. Braganza had simply fallen overboard, then his widow would recover the death benefit. But if BP's conclusion was that he had jumped overboard to kill himself, no benefit would be payable to Mrs Braganza.

BP convened a team to investigate how and why Mr Braganza disappeared overboard, with the purpose of ascertaining whether there could be any lessons learned from the incident. It concluded that Mr Braganza had jumped overboard to commit suicide, and BP maintained that they were not obliged to pay the death benefit.

Mrs Braganza sued BP in the Admiralty Court, bringing both an ordinary tort claim against BP for their alleged negligence in causing Mr Braganza's death, and a claim for breach of contract in which she challenged the suicide finding. The tort claim against BP failed at first instance and was not pursued on appeal, but Teare J upheld the challenge to the suicide finding, holding that BP's conclusion was unreasonable.

Teare J's decision on the finding of suicide was unanimously reversed by the Court of Appeal. In particular, Longmore LJ rejected Mrs Braganza's claim that BP's team was obliged specifically to direct itself as to the drastic nature of a suicide finding, or the inherent improbability of a person committing suicide.¹⁴ Although Longmore LJ accepted that BP were required to act reasonably and not capriciously, he did not accept that this extended to BP expressly directing themselves properly in law and evidence as might a court.¹⁵ Longmore LJ did not cite *Wednesbury*.

¹⁴ *Braganza* n11

¹⁵ *Ibid*

In the Supreme Court, there was no dispute that BP were under a duty to act in good faith and not to act arbitrarily, capriciously, or irrationally. Before *Braganza*, there was already substantial case law confirming that where a contract gave one party a discretion, the law would imply a term requiring good faith, and “the absence of arbitrariness, capriciousness, perversity, and irrationality”.¹⁶ These cases were collectively cited with approval by Lord Sumption in *British Telecommunications*.¹⁷ In another case,¹⁸ Lord Sumption, in an ‘obvious echo’ (per Lady Hale in *Braganza*)¹⁹ of Lord Diplock’s test for public law irrationality in *GCHQ* (discussed below), held that rationality, in the contractual context, was distinct from reasonableness, and that to prove irrationality required something ‘so outrageous in its defiance of logic as to be perverse’²⁰

What this shows is that, prior to *Braganza*, it was clear that a duty to act in good faith and rationally was implied into contracts containing a discretion. That this duty arose on the facts of *Braganza* was not in doubt, as the Court of Appeal had accepted.²¹ What *Braganza* was about was the *content* of the duty. Should Lord Sumption’s ‘obvious echo’²² in *Hayes* of Lord Diplock in *GCHQ* mean that a court should review exercises of contractual discretion for rationality in precisely the same way it approaches an Administrative Law discretion under *Wednesbury*? And, in

¹⁶ *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] Bus LR 1304, [66]

¹⁷ *British Telecommunications Plc v Telefónica O2 UK Ltd* [2014] UKSC 42, [2014] Bus LR 76, citing *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The “Product Star”) (No 2)* [1993] 1 Lloyd’s Rep 397, *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] EWCA Civ 1047, [2001] 2 All ER (Comm) 299, *Socimer* (ibid), [2008] Bus LR 1304, *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 (HL), *Ludgate Insurance Co Ltd v Citibank NA* [1998] Lloyd’s Rep IR 221

¹⁸ *Hayes v Willoughby* [2013] UKSC 17, [2013] 1 WLR 935

¹⁹ *Braganza v BP Shipping* [2015] UKSC 17, [2015] 1 WLR 1661, [23]

²⁰ *Hayes v Willoughby* [2013] UKSC 17, [2013] 1 WLR 935, [14]

²¹ *Braganza* n11, [13] (Longmore LJ)

²² *Braganza v BP Shipping* [2015] UKSC 17, [2015] 1 WLR 1661, [23]

particular, did this mean that a contractual decision-maker's decision could be challenged if the decision-maker took extraneous matters into account, and/or ignored relevant matters?

On this point, Lady Hale (with whom Lord Kerr agreed) and Lord Hodge each gave judgments favouring a requirement that BP's reasoning process had to consider all relevant matters and disregard all irrelevant matters.

It was in this respect that Lady Hale and Lord Hodge each borrowed considerably from the *Wednesbury* framework in public law. Lady Hale began her discussion of a potential similarity between review of contractual discretion and review of administrative discretion by reciting Lord Greene's test for irrationality in *Wednesbury*, and observing that it requires both that the right matters be considered, and that the final outcome of the process must be rational in the *Wednesbury* sense (on which more below). She began by citing – and approving – the judgments of Mocatta J in *The Vainqueur Jose*²³ and of Dyson LJ in *Gan*²⁴ which had established that a defendant exercising contractual discretion could not consider “extraneous” (ie irrelevant) matters. Building on these conclusions, Lady Hale reasoned that, if an obligation to disregard extraneous matters was implied, there was no good reason why a duty to consider relevant matters should not also be implied.²⁵ Therefore all three limbs of Lord Greene MR's formulation of the test for *Wednesbury* rationality in the administrative context applied to the exercise of a contractual discretion. To that end, Lady Hale quoted Lord Greene's passage in *Wednesbury* setting out the three-pronged test verbatim.²⁶

²³ *The Vainqueur Jose* [1979] 1 Lloyd's Rep 557

²⁴ *Gan* n17

²⁵ *Braganza* n8, [22]

²⁶ *Ibid* [24]

To recap, the contractual duty to act rationally would be breached if (a) irrelevant matters were considered; or (b) relevant matters were excluded from account; or (c) the decision was so unreasonable that no reasonable decisionmaker could have reached it. Lady Hale did accept that the law on how closely the analogy with *Wednesbury* should be drawn, in the contractual context, would require further analysis in later cases, but held it to be ‘unnecessary’ to embark on that exercise in *Braganza* itself.²⁷ What *Braganza* clarified was that, where a contract granted a discretion which was subject to the duty not to act irrationally, the *Wednesbury* test was the way to decide whether that duty had been breached, and in particular, this meant that the contractual decisionmaker had to consider all relevant matters and exclude irrelevant matters. However, it did not affect the circumstances in which the duty to act rationally in contract arose (which is considered below); it only clarified what that duty means when it does apply, and crucially that it means that the decision-maker’s *reasoning process* must be rational as well as the outcome.

Lord Hodge reached similar conclusions on the link to *Wednesbury* as Lady Hale, but set further stock in the nature of the employment relationship between Mr Braganza and BP as one which implied duties of “trust and confidence”. This was an additional reason why the decision-making process should have to be rational in the *Wednesbury* sense.²⁸ He remarked that employment contracts have “specialties [ie unique features] that do not normally exist in commercial contracts”.²⁹

Although Lord Neuberger dissented as to the application of the *Braganza/Wednesbury* test to the facts, he agreed with Lady Hale that the duty not to act irrationally involved a duty to take

²⁷ Ibid , [32]

²⁸ Ibid [54]

²⁹ Ibid [54]

the right matters into account when making the decision, substantially for the reasons she gave.³⁰ He explicitly stated that he agreed with her conclusion that the test for review of contractual discretion should be the same as that for administrative discretion.

Thus, notwithstanding Lord Neuberger's dissent, there was substantial common ground between the majority and the minority in *Braganza*. In particular, the Justices were unanimous in rejecting the argument for BP that it was under no obligation to take the right matters into account so long as the final conclusion was one to which a reasonable person might have come. As Lord Hodge put it:

‘it is difficult to treat as rational the product of a process of reasoning if that process is flawed by the taking into consideration of an irrelevant matter or the failure to consider a relevant matter.’³¹

The only real point of contention within the Supreme Court was therefore about the *application* of the test. On this point, Lady Hale concluded that the BP's decision making process was flawed for two reasons: first, they had failed to consider that suicide was an inherently unlikely outcome which would therefore require cogent evidence, as a matter of common sense, before anyone could rationally accept that this had happened;³² and second, they had failed to consider that there was a legitimate reason why Mr Braganza went on-deck on the day he disappeared, and that an accident might have happened whilst on-deck.³³

³⁰ Ibid [103]

³¹ Ibid [53]

³² Ibid [39]

³³ Ibid, [41]

Lord Neuberger agreed that a test analogous to *Wednesbury* applied, but, in his view, this was a case where recourse to inherent probabilities was unnecessary. An inherently improbable event had clearly occurred in the form of Mr Braganza's death. The only issue was how that improbable event had occurred (accident or suicide?) which had to be answered on the balance of probabilities.

B. *Wednesbury* irrationality, reasonableness, and Administrative Law's search for principle

We have seen in the preceding section how significantly Lady Hale and Lord Neuberger each relied on the traditional *Wednesbury* formulation in *Braganza* as the test for review of discretions and fact-finding under a contract. But what is striking about this is how the law has moved on in the Administrative Court beyond a formulaic application of Lord Greene MR's three-prong test in *Wednesbury*. This section will explain how the law has moved on in the Administrative law context. It will first explain the background of *Wednesbury* itself, and how Lord Diplock developed this formulation in the *GCHQ* case.³⁴ These were the only two authorities on public law rationality that Lady Hale cited in *Braganza*. The section will then turn to how the *Wednesbury* approach has become more nuanced since *GCHQ*, citing successful claims argued under a head of 'rationality' in the modern law which seem not to meet Lord Greene MR's initial formulation. This will pose an important question which will be considered in Chapter II: to what extent should *Wednesbury*, as initially formulated, govern the exercise of

³⁴ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL)

contractual discretions given that *Wednesbury* is scarcely the last word in Administrative Law, where it initially developed?

1. The original test in *Wednesbury*

In *Wednesbury*, a cinema group had applied to the Wednesbury Corporation³⁵ for a licence to show films on Sundays. The governing statute allowed the Corporation to attach conditions to any licence granted,³⁶ and the Corporation imposed a condition on the cinema that no children under fifteen were to be admitted on Sundays.³⁷ The cinema group argued that the decision was ultra vires on the ground that it was unreasonable. The Court of Appeal rejected this submission. Lord Greene MR emphasised the wide power to impose conditions inherent in the 1932 Act, and the fact that there was no appeal from the Corporation to a court. The court's jurisdiction was supervisory only. It was no part of its role to decide what conditions should be imposed, but rather only to decide whether the Corporation acted lawfully in imposing the conditions it did. This meant:

“The court is entitled to investigate the action of the local authority with a view to seeing whether they have considered matters which they ought not to consider, or, conversely, have refused [...] or neglected to consider matters which they ought to consider. Once that question is answered in favour of the local authority, it may be still possible to say that [...] they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.”³⁸

³⁵ In modern language, a local authority equivalent to a district; see Local Government Act 1972, s. 1(11)

³⁶ Sunday Entertainments Act 1932, s. 1(1)

³⁷ *Wednesbury* n9

³⁸ *Wednesbury* n9 233-234.

The famous example Lord Greene gave of such a decision was that of a teacher being sacked because she had red hair. This, he said, would be irrational in the sense he described.³⁹ It is worth stating that Lord Greene says that sacking a teacher for having red hair could be conceived of either as considering an irrelevant matter or reaching a substantively unreasonable (post *GCHQ*, irrational) conclusion; ‘these things all run into one another’.⁴⁰ Although *Braganza* itself is clearly reasoned as a failure in the reasoning process, we will see many cases that follow *Braganza* equally could be conceived of as either a problem with process or an irrational outcome. Lord Greene clearly averts to how the line between the two is clear in theory, but hard to draw in practice.

As earlier noted, all the Justices in *Braganza* accepted, in the sphere of contractual discretion, that it is not for the court to decide how it would have exercised the discretion, just as Lord Greene accepted that it was not for a court of supervisory jurisdiction to decide how the local authority’s power in that case ought to be exercised. Where the court is reviewing the exercise of discretion (be it administrative or contractual) the court is asking only whether the decision-maker acted lawfully or not; not whether they came to the right decision.

The fact that the test for intervention in *Wednesbury* was so high meant that the claim in that case failed. It may seem strange to modern eyes, but the court concluded that the welfare of children was relevant to the question of whether they ought to be excluded from a cinema on Sundays and the decision of the local authority was one to which a reasonable local authority might have come.

³⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

⁴⁰ [1948] 1 KB 223, 229

The test for unreasonableness in administrative law derived from *Wednesbury* was reformulated slightly in *GCHQ*, whilst it still remained clear that the court was not entitled to substitute its own view for that of the public body. *GCHQ* involved a decision by the Prime Minister to ban members of the security service from unionising. This was an exercise of the prerogative power to set terms for public servants. The case is perhaps more famous for its conclusion that prerogative powers can be subject to judicial review, but it also contained the following characterisation of the *Wednesbury* test for unreasonableness (termed “irrationality” in *GCHQ*) from Lord Diplock: if the right matters were considered, the court could only intervene if the decision was

‘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.’⁴¹

Although Lord Diplock’s formulation in *GCHQ* is different to the formulation of Lord Greene in *Wednesbury*, the fundamentals are the same: the decision has to be completely unreasonable before a court can step in.

Wednesbury and *GCHQ* were the two leading administrative law cases that were cited in *Braganza*. Both suggest that the bar for challenging the rationality of a decision by a public body is extremely high. However, the cases cited below show some signs of erosion of the full rigours of the *Wednesbury/GCHQ* test, and a level of contextualisation in the modern law in which the relative institutional position of the court and the initial decision-maker, and the subject matter

⁴¹ *GCHQ* n34, 410 (Lord Diplock)

of the decision in question, are also considered in deciding how high the bar for judicial intervention should be. It is important to note that none of these cases were cited in the *Braganza* judgments, which gives rise to the criticism (developed and evaluated in Chapter II) that the Supreme Court was borrowing from public law a test which has since changed.

2. Rationality in the 21st Century

In some circumstances, rationality review is nowadays less deferential than Lord Greene and Lord Diplock suggest. In the decade or so before the Human Rights Act 1998 came into force, review for rationality at common law of ministerial decisions with human rights implications was said to be more intense than in non-human rights cases, even though ‘rationality’ (pre HRA) remained the headline test. In *R v Secretary of State for the Home Department ex parte Brind*⁴², the Home Secretary had imposed restrictions on what the BBC could broadcast under a general power conferred by the Broadcasting Act 1981, preventing them from playing the direct (ie recorded) speeches of IRA and Sinn Féin members. Brind argued that this violated principles of free speech. As this was 1991, Brind could not rely on Article 10 of the European Convention directly, as one could now, but one of his submissions was that the importance of freedom of speech could be considered by the court at common law under *Wednesbury* review. Although the claim still failed, the House of Lords did accept the point, with Lord Bridge holding that a court could

⁴² *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (HL); *R v Secretary of State for the Home Department, ex parte Bugdaycay* [[1987] AC 514 (HL)

‘start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it.’⁴³

Although the primary decision-maker would still be the Home Secretary, the court was allowed to exercise a ‘secondary judgment’⁴⁴ as to whether the Home Secretary acted rationally, not just in a general sense, but also in reaching the specific conclusion that an interference with free speech was justified.

This last point is important because it shows the law moving on from *Wednesbury*. Given the fact that *Wednesbury* involved the licensing of disseminating media (albeit in a completely different form), there would surely have been a case for saying that the restriction in that case amounted to an interference with free speech. If Lord Greene had been writing after *Brind*, it would not have been enough for him to conclude that the welfare of children was *a* relevant matter that had been considered rationally; he would have also been required to find that the *Wednesbury* Corporation had considered that this amounted to an important competing interest before he could have sustained their decision. It is unlikely that this criterion would have been satisfied; had *Brind* been authority when *Wednesbury* was decided it is hard to see the same result being reached in *Wednesbury*.

This is a clear example of where *Wednesbury* has evolved, but one might think it somewhat remote from the exercise of contractual discretion in *Braganza*. But there are further examples from a non-rights context which also show the test being more open-ended.

⁴³ Ibid 748-749

⁴⁴ Ibid

For example, *Campaign Against Arms Trade*⁴⁵ involved a challenge to a decision by the Secretary of State to grant an export licence to sell arms to Saudi Arabia. The Secretary's policy was not to grant such a licence if there was a real risk they could be used to commit war crimes. The Campaign argued that in making the assessment in the present situation, account had not been taken of evidence of serious breaches in the past. This argument succeeded in the Court of Appeal. Although, again, the Court accepted rationality as the headline test in reviewing the defendant's finding that the risk of war crimes was absent, the court considered there to be significant failings in the Home Secretary's approach. The court rejected the argument that the defendant acted rationally in declining to consider past breaches because it might be difficult to know for certain what actually happened; although this was true of some incidents, there were plenty of others where a finding could be made one way or the other on the material available.⁴⁶ In any case the defendant was bound to try and make findings.

It is true that *R(CAAT)* straddles the boundary between an error in *process* and an error in *outcome* (as Lord Greene foresaw) given the question was what inquiries the defendant had to make about past events (previous breaches) in order to predict what might happen in the future (future breaches). That said, this case still seems to involve a somewhat looser approach to rationality than *Wednesbury*. As Craig points out, the decision of the Secretary of State not to investigate past breaches owing to evidential difficulties can hardly be equated to sacking a teacher because they have red hair.⁴⁷

⁴⁵ *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020

⁴⁶ *Ibid* [138]-[139]

⁴⁷ Paul Craig, *Administrative Law* (9th Ed), Sweet and Maxwell 2019, [21-011]

Dicta also supports the proposition that the test in administrative law is more nuanced than *Wednesbury* suggests. *Wells*⁴⁸ was a challenge by a prisoner under the old sentence of imprisonment for public protection against the Parole Board's decision to refuse his application for release on licence. The prisoner had a very bad record of previous offending, but the offence for which he was then presently incarcerated was relatively less serious (robbery, but without a weapon). A challenge to the rationality of the decision succeeded. The evidence strongly showed the offender did not pose a sufficient risk to the public to justify refusing release. Amongst other things, release had been recommended to the Board by two psychologists; he was only recalled for a minor parole violation and had not been arrested for any violent offences; and he had a good prison record following recall.⁴⁹ Moreover, Saini J explained that, in dealing with the rationality challenge, a 'more nuanced' approach would be taken by the modern law than the word 'rationality' or the three prong test of Lord Greene MR. The court would test the decision made against the evidence and ask whether the conclusion could be 'justified'.⁵⁰ Although Saini J argued that this was 'just another way'⁵¹ of applying Lord Greene MR's *Wednesbury* test, it is hard to make that argument given the lack of any 'testing' happening in *Wednesbury* itself. The local authority's justification in *Wednesbury* was accepted in a terse passage compared with the lengthy analysis of Saini J in *Wells*, or the Court of Appeal in *CAAT*. The far more realistic conclusion is that, although the courts do still recognise the authority of public law decision-makers as primarily responsible for the decision, the analysis in *Wednesbury* cases is far less perfunctory than it used to be.

⁴⁸ R (*Wells*) v Parole Board [2020] EWHC 2710 (Admin)

⁴⁹ [37]

⁵⁰ Ibid[32]

⁵¹ Ibid

Why does this matter to *Braganza* claims? First, we need to know what review of contractual discretions looks like. Is it the fairly “rubber-stamp” type of review in the *Wednesbury* case itself (which was, after all, the case which the Supreme Court cited in *Braganza*), or is it like Saini J’s broader approach in *Wells*? If the latter, then can this still be recognised as clearly part of the implied intention of the contracting parties (as part of the test for ascertaining whether an implied term exists)? And if the test to be applied to *Braganza* claims will be the more “nuanced” version of the *Wednesbury* test, then why not cite the cases that apply that more nuanced version openly, rather than relying almost solely on *Wednesbury* and *GCHQ* (as Lady Hale does in *Braganza*)? Finally, if the test is actually akin to the less intense review in *Wednesbury* itself, then one would need to explain why one is adopting a test which was first created in Administrative Law some sixty years ago, and which has evolved since that time. It is one thing to borrow an extant rule from another part of the legal system, but quite another to transplant a rule which has since evolved.

None of this is to say that the questions posed above are unanswerable; trying to answer them is the point of the thesis. Part of the next section will focus on how “*Wednesbury* type review” of *Braganza* cases has looked in practice in the first instance courts, to try and establish whether the type of review applied is more synonymous with modern administrative law approaches or traditional ones.

C. The *Braganza* duty in the High Court

This section seeks to give an account of how *Braganza* review has been approached in other cases. It will first seek to answer the vexed question as to when the *Braganza* duties apply to a contract at all. It will then discuss how *Braganza* review works in practice, in particular by

answering the question posed above concerning whether a *Braganza* review takes the shape of a “modern” *Wednesbury* review of the type seen in *Wells*, or the more deferential approach of Lord Greene in *Wednesbury*.

First, we will see that the reasoning process seems to be different depending on whether the discretion under the contract is ‘strong’ or ‘weak’ as defined and explained in sub-part 1.m. In relation to the question of whether the *Braganza* control applies *at all*, judges seem much more willing to imply *Braganza* duties into weak discretions than strong ones, which suggests the conclusion that the *Braganza* controls are implied in law when the discretion is weak, but only *might* be implied in fact (depending on how the court approaches the ‘officious bystander’ test⁵²) when the discretion is strong. Second, much the same distinction affects how a court approaches review of the exercise of the discretion when *Braganza* does apply.

1. The Gateway Question: When Does Braganza Apply?

In *Braganza*, all parties accepted from the start⁵³ that a duty not to act arbitrarily or irrationally existed; the major question of principle was what the test for irrationality was. But in cases both before and after *Braganza*,⁵⁴ defendants have sought to argue that the *Braganza* duties do not apply at all because the so-called discretion is an absolute contractual right to which the duty to act rationally never attaches. Although the point did not arise in *Braganza*, it is therefore crucial to address the threshold question, ‘when does the duty to act rationally (and therefore *Braganza*) apply?’

⁵² *The Moorcock* (1889) 14 PD 64; *Shirlan v Southern Foundries Ltd* [1939] 2 KB 206 (CA) (affirmed, [1940] AC 701 (HL) *sub nom. Southern Foundries Ltd v Shirlan*), *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10

⁵³ *Ibid*, [14]

⁵⁴ Eg *TAQA Bratani Ltd v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm)

In administrative law, the obligation on a public body to act in a *Wednesbury* rational way almost always applies⁵⁵ to executive bodies, especially those acting under statutory powers. The main debate here seems to be whether judicial review ought to be more restrictive, in particular by replacing *Wednesbury* review of executive action with a proportionality test even where the HRA does not apply.⁵⁶

Conversely, in the contractual sphere, one still must answer the gateway question of whether review is available at all. We will see from *TAQA Bratani* that even post-*Braganza*, courts may find that a given power is not merely a discretion but an “absolute contractual right”,⁵⁷ meaning that the party may exercise the power for any reason it pleases and need not act rationally. *Braganza* clarifies the test for review when the duty to act rationally does apply, but before getting to that question, one must ask the gateway question whether the duty to act rationally arises at all. Because the answer to this ‘gateway’ question was not altered by *Braganza*, I will draw on both pre-*Braganza* and post-*Braganza* case law to answer this question. As outlined above, the indication is that the duty (and therefore *Braganza*) is more readily implied into ‘weak discretions’ than ‘strong’ ones. Although this model was not explicitly adopted by the Supreme Court in *Braganza*, it has gained approval from Foxton J, and provides a good explanation of the law in this field.⁵⁸

⁵⁵ There are some non-justiciable prerogative powers, but the field of non-justiciability is ever-shrinking; see inter alia *R (Miller) v Prime Minister (No 2)* and *Cherry v Advocate General* [2019] UKSC 41. But cf *Dissolution and Calling of Parliaments Act 2022*, s 3.

⁵⁶ *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [303] (Baroness Hale)

⁵⁷ *TAQA* n57

⁵⁸ D Foxton, “A Good Faith Goodbye? Good Faith Obligations and Contractual Termination Rights [2017] LMCLQ 360

Before going further, it is best to explain what weak and strong discretions are. The language of ‘weak’ and ‘strong’ discretions initiated with Dworkin,⁵⁹ and was applied to contractual context by Leggatt J⁶⁰ and Sir David Foxton⁶¹ On Dworkin’s analysis, a weak discretion is usually a power to decide whether a state of facts exists or not, whereas a strong discretion is a power to decide what to do. Dworkin gives the example of a sergeant who is ordered to pick his five most experienced men for patrol;⁶² this is a weak discretion because although the sergeant might have some margin for judgement in deciding who was the most experienced given the circumstances of the operation to be conducted, the sergeant fundamentally must pick the five people who in his view are the most experienced to comply with the order. Contrast that with a sergeant who is just ordered to choose five men for patrol.⁶³ This is a strong discretion. The sergeant can consider a wide variety of matters in deciding who to pick, such as who has had more onerous duties in the past and ought now to be given a rest, and the desirability of giving less experienced soldiers an opportunity to gain some experience. He need not tie his decision back to the criterion of “experience”, and his discretion is not limited to evaluating who is more experienced.⁶⁴

It may be objected that the dichotomy between ‘weak’ discretions and ‘strong’ discretions is misleading because even a decisionmaker with a ‘weak’ discretion can have wide ranging powers to weigh information to reach a conclusion. For example, in *Braganza*, BP had to weigh

⁵⁹ R Dworkin, *Taking Rights Seriously* (Bloomsbury 2017), 48

⁶⁰ *Brogden v Investec Bank Plc* [2014] EWHC 2785 (Comm)

⁶¹ Foxton n 58

⁶² Dworkin n59, 48

⁶³ *Ibid*, 48

⁶⁴ In some cases a decisionmaker may have two sequential discretions: the first weak, and the second strong. In deciding whether a foul has been committed, a football referee has a weak discretion because his power is limiting to deciding and evaluating the facts. But, *if* he decides a foul has taken place, he has a strong discretion in deciding how to deal with it (free kick, yellow card, etc). In this way, the exercise of a weak discretion in a particular way can be a condition precedent to the existence of a strong discretion.

up (inter alia) the relative importance of (1) Mr Braganza's behaviour in the 36 hours before the disappearance,⁶⁵ (2) his correspondence with his wife suggesting he was suffering from low mood,⁶⁶ (3) the fact that Mr Braganza was normally safety conscious,⁶⁷ and, of course (4) the inherent improbability of suicide.⁶⁸ The number of things that BP could weigh up was wide ranging; hence it might be thought misleading to refer to BP's power as a weak discretion. However, it is worth emphasising that the phrases 'weak' and 'strong' discretions are, in essence, shorthand labels for 'powers to determine and evaluate the facts' and 'powers to decide what to do', respectively. It is in that sense that the dichotomy between weak and strong discretions is used here.

The discretion in *Braganza* was weak. BP's power under the contract was limited to deciding whether or not a state of affairs existed; namely whether Mr Braganza's death occurred as a result of his wilful act. While BP had authority to determine that question – a point which, as we have seen, Lady Hale made clear – this was not a case in which BP had a wide authority simply to pay the sum which, in their opinion, ought to be paid. If BP did not reach the factual conclusion that Mr Braganza's death was caused by his wilful act, they would have no choice but to award the benefit; they could not withhold it because they thought other workers were more deserving of a bonus than Mr Braganza or his widow. If the case were one of a strong discretion, they would have had such a power.

Although *Braganza* was not expressly limited to weak discretion, a review of the case law reveals that judges have been far more willing to conclude that a contractual discretion is limited

⁶⁵ Ibid, [69]

⁶⁶ Ibid, [73]

⁶⁷ Ibid, [116]

⁶⁸ Ibid, [119]

by the *Braganza* control when the discretion is weak, in the sense explained above, than when it is strong.

a. Weak discretion – *Braganza* easily implied.

Prior to *Braganza*, there was already a strong line of decisions confirming that weak discretions would easily give rise to controls on discretion.

In *Brogden*,⁶⁹ employees at the defendant bank were to be given a bonus in the amount of 30% of their “economic value added” (‘EVA’), as assessed by the bank. Assessing such a bonus would clearly come within the language later used by Lady Hale in *Braganza* because the bank had to form an opinion as to relevant facts to decide how much economic value each employee added to the company and thus how much his bonus would be. It was a weak discretion. In the High Court, Leggatt J, after drawing the distinction between ‘weak’ and ‘strong’ discretion, explained that the duty – already established pre-*Braganza* – not to exercise a discretion irrationally clearly applied to weak discretion (such as making an assessment according to some fixed criterion). On the facts, this meant that, whilst the Court was not entitled to substitute its own view of any employee’s EVA, it was entitled to see that the bank’s assessment was not capricious, arbitrary, or irrational. Although this case was decided before *Braganza*, so the issue of the bank’s reasoning process is not addressed in detail, one can confidently assume that - post *Braganza*’s full adoption of *Wednesbury* - a court would review the bank’s reasoning process in a case such as this, as well as the rationality of the outcome.

⁶⁹*Brogden* n60

Similarly, in *Socimer*,⁷⁰ a contract gave the defendant the power to value securities. This is a weak discretion. Although it is true that the value of a security is a far more subjective question than whether Mr Braganza killed himself, it requires the decisionmaker to evaluate a single criterion, namely the value of the security. Although assessments of value might vary, the exercise is fundamentally one of evaluating the facts and assessing what they mean (thus a weak discretion), rather than deciding what to do (which would be a strong discretion). Rix LJ had little trouble in concluding that a duty not to value those securities in a way that was irrational (in the *Wednesbury* sense) applied. *Wednesbury* was cited extensively,⁷¹ in particular in order to contrast the high “irrationality” threshold with the lower threshold of unreasonableness (in the sense used in negligence cases). Post-Braganza, a duty not to consider irrelevant factors or ignore relevant factors would also (one submits) be implied in such a case.

The final pre-*Braganza* case worth citing here is *The Product Star*.⁷² A charterparty gave the Master of a ship the power to refuse to unload at a port he considered “dangerous”. Leggatt LJ concluded that this did not leave the charterer subject to the Master’s “uninhibited whim”. The clause was not to be construed as protecting a Master who refused to go into a port that he irrationally (in the *Wednesbury* sense) thought was dangerous.

What this selection of cases demonstrate is that courts, even before *Braganza*, were willing to control weak discretion by requiring that it could not be exercised in an irrational manner. The weakness of the discretion in each of the cases discussed above, as well as in *Braganza* itself, lies in the fact that the contract ties down the discretion to a state of facts or an evaluative criterion,

⁷⁰ *Socimer* n16

⁷¹ *Ibid*, [60ff].

⁷² *Product Star* n17

such as (in *Braganza*) whether death was by suicide, (in *Product Star*) the dangerousness of a port, or (in *Socimer*) the value of the securities. As already emphasised, the contract in *Braganza* did not give a general (strong) discretion to withhold the benefit; likewise in *Product Star*, for example, the Master was not given a general discretion to refuse to sail into any port, but a specific (and weak) discretion to decide whether a port was dangerous or not.

This general approach of readily implying controls on discretion was enough to prevent BP even trying to argue in *Braganza* that no controls on discretion arose (confining themselves instead to arguing that the controls were weaker than in public law). Post *Braganza*, the trend continues.

In *Acorn*,⁷³ a land surveying company called CLS were insured by the defendants, Markel UK against professional liability CLS might incur to a third party. In the process of negotiating the insurance price, CLS ticked a box on a form representing that they had not been engaged in any contract to survey land for any sub-prime lender (because claims by such a lender would be far more expensive for CLS or any insurer to satisfy if the survey was done negligently). This was untrue. In fact, CLS had done work for Acorn, a subprime lender who then claimed CLS had been negligent.

In the meantime, CLS went bankrupt, so Acorn sued Markel as CLS' insurer directly under the Third Parties (Rights against Insurers) Act 1930. Markel purported to set aside the policy relying on CLS' failure to declare that they had worked for Acorn (an obvious misrepresentation). However, Acorn relied on the following clause:

⁷³ *UK Acorn Finance Ltd v Markel UK Ltd* [2020] EWHC 922 (Comm), [2020] 1 CLC 632 (HHJ Pelling QC)

‘(a) In the event of non-disclosure or misrepresentation of information to Us, We will waive Our rights to avoid this Insuring Clause provided that

(i) You are able to **establish to Our satisfaction** that such non-disclosure or misrepresentation was innocent and free from any fraudulent conduct or intent to deceive [...]’⁷⁴ (emphasis added)

As in *Braganza*, the contract did not require Markel to waive the right to avoid if the misrepresentation was innocent; it required them to waive the right to avoid if **they themselves were satisfied** that the representation was innocent. Accordingly, HHJ Pelling QC found that ‘the contract confers the decision-making power on the defendant [Markel]’,⁷⁵ but it was ‘clear’⁷⁶ that an implied term was to be read into the contract to the effect that Markel were not to decide whether the misrepresentation was unintentional in a way that was arbitrary, capricious, or irrational ‘in the sense identified by the Court [in *Wednesbury*]’.⁷⁷ Citing *Braganza*, the Judge held that this imported both an obligation to consider all (and only) the relevant factors *and* to avoid reaching a conclusion that no reasonable person would have reached. The Judge considered this to be a ‘classic case’ for the application of *Braganza*.⁷⁸ He rejected a submission by Acorn that the Court should act as primary decision-maker, but, having done so, the implication of the *Braganza* duty as a safety valve to protect the claimant’s rights followed axiomatically. This suggests that where the discretion is **weak** (eg a power to find facts rather than exercise a broad power to decide how to proceed) determining that the *Braganza* control applies should ordinarily be fairly straightforward.

⁷⁴ Ibid [37]

⁷⁵ Ibid [62].

⁷⁶ Ibid [63].

⁷⁷ Ibid [64]

⁷⁸ Ibid [68]

Finally, *Dwyer*⁷⁹ involved a franchising contract could be suspended by either side if the franchisor designated an event as *force majeure*. This was a weak discretion because it only allowed the franchisor to evaluate whether or not a given event was force majeure; if the franchisor thought an event was force majeure there was no power to refuse designation. The franchisee asked the franchisor to designate Covid-19 as force majeure, thus allowing the franchisee to suspend performance. The franchisor refused to designate Covid-19 as force majeure; ICC Judge Jones accepted this was subject to *Braganza* in a passage even more terse than *Acorn*.⁸⁰

In addition to this, it is worth remembering that Lady Hale in *Braganza* suggested that the rule against irrational decision-making should apply whenever ‘one party [...] has a power to exercise a discretion, or **to form an opinion as to relevant facts.**’⁸¹ Again, this strongly suggests that *Braganza* applies to fact-finding powers simply because they are fact-finding powers; no further analysis is required once a fact-finding power has been shown to exist. In particular, where the power in question is a fact-finding power, ie a weak discretion, the court is never drawn into the difficulty (which we will see below often arises in strong discretion cases) of deciding whether the power in question is a ‘discretion’ (in which case the *Braganza* control applies) or an ‘absolute right’ (in which case not).

⁷⁹ *Dwyer UK Franchising Ltd v Fredbar* [2021] EWHC 1218 (Ch)

⁸⁰ *Ibid* [263]

⁸¹*Braganza* n8, 18

A major case where a power to form an opinion as to facts was held not to give rise to the *Braganza* duty is *Compass Group*.⁸² The Compass Group are contracted by numerous NHS trusts to perform administrative and support tasks in hospitals (such as providing porters, patient and staff catering, and concessions). Their contract with the Trust set out standards for how they were to work, and allowed the Trust to award failure points if those standards were not met. These failure points would lead to deductions from the contract price, and possible termination. Compass sought to challenge numerous instances of failure points being awarded. In this case, it was held that the (pre-*Braganza*) duty not to act arbitrarily was not to be implied into the Trust's assessment of whether a service failure had occurred. However, the reasons why do not affect the wider points made above. In *Compass*, the contract made clear that, although the Trust would make a determination as to whether a failure event had taken place, that determination would not in any way bind the courts. If Compass wanted to dispute whether a failure event had occurred, they could sue, and the court would decide whether the failure had in fact occurred. Unlike *Braganza*, a court *was* entitled to substitute its own view of the facts for that of the Trust. Per Jackson LJ, there was 'no need'⁸³ for an implied term of rationality. However, given the points of distinction from *Braganza*, nothing in *Compass Group* affords any ground for doubting the proposition that where a party to a contract has a power to determine the facts in a way that would bind a court (as in *Braganza*, *Acorn* and *Dwyer*), the obligation to have a *Wednesbury* rational reasoning process and outcome applies.⁸⁴ The reason why such a requirement was not imposed in *Compass* was that the binding nature of the fact-finding process that was crucial in *Braganza* was absent from *Compass*.

⁸² *Compass Group UK Ltd v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200, see also *Knike Lets v Khaira* [2020] EWHC 616 (QB), *Sburbanova v Forex* [2017] EWHC 2133 (QB)

⁸³ *Compass* n82 [92].

⁸⁴ See also *Lehman Bros International (Europe) Ltd v ExxonMobil Financial Services BV* [2016] EWHC 2699 (Comm), [281]

In sum then, it is clear that where the discretion is one to find or assess a factual state of affairs on which a court is not able to substitute its own judgment, the duty not to act irrationally, and hence the *Braganza* duty to have a rational decision-making process, will always apply.⁸⁵

b. Strong discretions and ‘absolute contractual rights’ – a less predictable analysis

The readiness of the courts to imply the *Braganza* duty into a contract to control the exercise of contractual discretion is not so apparent when the discretion is strong. Here, a far more nuanced analysis takes hold. This is so, because the relevant power, in this instance, is likely to be phrased ‘Party X may do Y’, often without much guidance about whether Party X has an absolute contractual right to do Y if he so chooses (in which case *Braganza* does not apply) or a discretion (in which case the *Braganza* duty will apply). The following cases demonstrate that, where the putative discretion is framed strongly, the results are far less predictable than the fact-finding or assessment discretions detailed above, and it is much harder to show that the *Braganza* duty should be implied than in weak-discretion cases.

In *TAQA Bratani*,⁸⁶ TAQA and Rockrose, both oil companies, were in a joint venture with several other oil companies to operate oil fields in the North Sea. For each space in the North Sea where oil operations were to take place, one of the companies was to be nominated as the ‘Operator’. The venture was directed by a Committee consisting of delegates from all the parties to the venture. Clause 19.1.a of the contract governing the joint venture allowed the nominated Operator to be terminated by ninety days’ notice, following a unanimous vote of the other

⁸⁵ Barring the possibility of an exclusion clause, which, see below, is beyond the scope of this thesis.

⁸⁶ *TAQA* n54

members of the Committee. Other clauses created discrete termination powers (exercisable mainly by majority vote) to allow termination following breach.⁸⁷ Pursuant to cl.19.1.a, the rest of the Operating Committee terminated Rockrose's role as Operator, and thereafter sought a declaration in the Commercial Court that this termination was valid. Rockrose submitted that the power to terminate, other than following breach, was subject to the *Braganza* duty.

Judge Pelling concluded that the termination power was absolute and unqualified, and could be exercised for any reason whatsoever. It did not have to be exercised in good faith or be *Wednesbury* rational. He reached this conclusion in stages: first, the Judge engaged in a textual analysis to see whether the text of the contract supported a conclusion that the termination power in 19.1.a was fettered in any way other than the agreement of the Operating Committee; and second, he asked whether there was any ground for implying a term to that effect. He answered no to both questions.

As to the textual question, Judge Pelling applied the conventional approach to interpretation set out in *Arnold v Britton*.⁸⁸ The court had therefore to 'identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"'.⁸⁹ Nothing in cl.19.1.a set out any conditions precedent to the exercise of the termination right it conferred, save the requirements for ninety days' notice and for the Operating Committee (except the Operator themselves) to act unanimously. Moreover, the fact that the other termination rights, contained in Clause 19.1.b, and operating immediately

⁸⁷ *TAQA* n54, *Ibid* [20]

⁸⁸ *Arnold v Britton* [2015] UKSC 36, [2015] 2 WLR 1593, [14]-[23]

⁸⁹ *Ibid* citing *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, [14] (Lord Hoffmann)

(rather than by ninety days' notice) on a majority vote, were all termination rights for various causes (eg breach of contract, insolvency, or disposing of a proprietary interest in the oil field) strongly suggested that, where a termination right was only intended to be exercised for good reasons, the contract said so. That no such requirement appeared in cl.19.1.a meant the termination right created by *that clause* was capable of being exercised without cause; it was an absolute right to terminate.⁹⁰

It followed that no term could be implied, either. Although Judge Pelling cited *Braganza*, he distinguished that case on the ground that it did not apply to absolute contractual rights.⁹¹ It was necessary to decide whether a power was an absolute right or a discretion first, before ascertaining what controls acted on those powers. The term to be implied had then to meet the high threshold for an implied term confirmed by the *MeS case*; it had to be necessary for business efficacy. Implying a term that the power to terminate had to be exercised rationally might have made the contract fairer, but it was not necessary.

An implied duty of rationality was similarly rejected in *Lomas*, which concerned whether it applied to the termination of a swap agreement.⁹² The case before the Court of Appeal was wide ranging, so this issue was dealt with briefly, but decisively. The Court of Appeal described a submission that the right to terminate the swap agreement was tempered by good faith or rationality requirements as 'hopeless'.⁹³ In so doing, they compared the right under the contract to terminate to the right of an innocent party to a contract to accept the repudiatory breach of

⁹⁰ See also *UTB v Sheffield United* [2019] EWHC 2322 (Ch); cf *Timeload Ltd v British Telecommunications Plc* [1995] EMLR 459, *Commerzbank v Keen* [2006] EWCA Civ 1536

⁹¹ *TAQA 54*, [46]-[48]

⁹² *Lomas v JFB Firth Rixson* [2012] EWCA Civ 419

⁹³ *Ibid*, [46]

the other as bringing the contract to an end, a right which is unfettered. The Court said that neither of these rights would ever involve a control of discretion because saying a control might exist on the discretion really just begged the question: was the power to terminate a discretion or a right? In *Lomas* the Court of Appeal felt it was the latter.

There are, however, some cases of strong discretion (ie “party X may do Y”) being recognised in contradistinction to a right, and thus as giving rise to the *Braganza* duty. The point here is not to say that this never happens, only that it is far less predictable than the court’s control over weak discretion. *Gan*⁹⁴ is an early example of such a case. This involved a reinsurance contract under which Gan agreed to re-insure (underwrite) some of the liability that Tai Ping might incur under an insurance policy taken out by Winbond (who were not a party to the litigation). Under the reinsurance policy between Gan and Tai Ping, Tai Ping were not to accept any claims made by Winbond without Gan’s consent. The aim behind this clause was obvious; Gan did not want to have to pay claims made by Winbond that Tai Ping could and should resist. If Tai Ping’s risk under their contract to insure Winbond was non-existent, or substantially diminished by the fact that the re-insurance contract would pass it on to Gan, there was a risk that Tai Ping would be too quick to accept claims by Winbond. Hence why the contract required Gan’s permission before Tai Ping could agree to settle any claims.

A question for the Court of Appeal was whether Gan’s power to give or withhold consent before any claims could be settled between Tai Ping and Winbond was subject to an obligation to decide in good faith and not in a way which was arbitrary, capricious, or irrational. Mance LJ held that there was such an obligation. He rested this conclusion on the purpose behind the clause. It was designed to protect Gan from claims that Tai Ping should have fought and

⁹⁴ *Gan* n17

therefore decisions by Gan whether and when to consent should be tied towards that purpose. He accepted that the obligation to act rationally could only exist if a term could be implied to that effect, and that the test for implying a term was a high one.⁹⁵ However, in determining whether the proposed implied term of good faith and rationality met the high threshold of being necessary for business efficacy,⁹⁶ regard had to be had to the purpose of the clause. Moreover, elsewhere in the contract Gan had accepted liability (subject to the consent requirement) for settlements of claims agreed to by Tai Ping; if Gan could refuse consent for wholly bad reasons, that other clause would be rendered nugatory.⁹⁷ It followed that, whilst the primary decision to give or refuse consent was Gan's, its refusal to do so could be challenged if it was "so unreasonable that no reasonable company could withhold its approval".⁹⁸ This language was used before *Braganza*, but its similarity to the language used there is striking. As Gan Insurance was decided pre-*Braganza* one cannot be certain that an obligation to engage in a rational decision-making process would also have been implied, but, given Judge Pelling's obligation that *Braganza* is of general application to all contractual discretions, it is highly likely that it would.⁹⁹

The above discussion has shown that courts are far more likely to imply controls on contractual discretion in the fact-finding or fact-assessment context than when the discretion is an open one. It is clearly possible, as shown by *Gan*, for a court still to imply the *Braganza* duty in this latter case, but this is far less predictable than in the fact-finding context. Moreover, it is of note that the general authorities on implied terms – *The Moorcock*, *Shirlaw*, *M&S*, and the like – were not cited by Lady Hale in *Braganza*, but they remain frequently cited as the high bar required in the strong discretion cases (including each of those just cited).

⁹⁵ Ibid [2001] EWCA Civ 1047.

⁹⁶ Ibid [46] citing *Moorcock* n52 and *Liverpool CC v Irwin* [1977] AC 239

⁹⁷ *Gan* n17, [47]

⁹⁸ *Gan* n17, [73]

⁹⁹ *Acorn* n73

c. *Shurbanova* – weak and strong side by side

A final illustration of how weak discretions more readily attract *Braganza* controls than strong discretions lies in *Shurbanova*,¹⁰⁰ a case involving both. Clause 26 allowed the defendants to decide whether transactions on a trading platform involved a manifest error. Deciding whether such an error occurred is a weak discretion. Judge Pelling held this attracted the *Braganza* duty. Conversely, Clause 27 gave a power to revoke certain transactions – a strong discretion. This was held not to be subject to the *Braganza* duty. So it is possible to see within the same case how judges are more willing to imply *Braganza* duties into weak discretions than strong ones.

d. The *Braganza* duty - implied in fact or in law?

Implied terms generally fall into two categories: terms implied in law and terms implied in fact. Terms implied in law are terms which are applied to a whole category of contract (eg sale, insurance, employment) whereas terms implied in fact arise out of the specifics of the individual case.¹⁰¹

The test for implying a term *in fact* is substantially based on the intentions of the parties, or what they would certainly have intended had they given a moment's thought to including the term in question.¹⁰² The test has been expressed in various ways,¹⁰³ however crucial to all such

¹⁰⁰ *Shurbanova v Forex* [2017] EWHC 2133 (QB)

¹⁰¹ E Peel, *Treitel, The Law of Contract*, 15th Ed (Sweet and Maxwell 2019), [6-070]

¹⁰² *Ibid*

¹⁰³ *Ibid* [6-055] – [6-063]

tests is that they must give effect what “notional reasonable people in the position of the parties” would have intended.¹⁰⁴

The leading modern authority on implied terms in fact is *MeS*.¹⁰⁵ In that case Lord Neuberger reemphasises that the test for implication of a term in a contract which the parties have not included is a high one:¹⁰⁶ the term must be reasonable; it must be necessary to give business efficacy to the contract or be so obvious as to go without saying;¹⁰⁷ the term must be capable of clear expression; and it must not contradict any express term. Although these prerequisites – and *MeS* as a whole – rows back somewhat from Lord Hoffmann’s previous claim in *Attorney General of Belize* to the effect that implication is just a part of the process for deciding what the meaning of the contract (and thus the intention of the parties) is,¹⁰⁸ Lord Neuberger was still clear in *MeS* that implication of terms still involved ‘determining the scope and meaning of the contract’.¹⁰⁹ Furthermore, the parallel tests of ‘necessity’ and ‘obviousness’ clearly do give effect to what reasonable people in the parties’ shoes must have intended, for it can scarcely be assumed that reasonable people would have objected to a term that passed either of those two tests. Moreover, in *MeS*, Lord Neuberger made clear that implication only arises once the express terms have been construed, and that an implied term in fact can never

¹⁰⁴Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, [2016] AC 742, [21] cited in E Peel, Treitel, *The Law of Contract*, 15th Ed (Sweet and Maxwell 2016), [6-054]

¹⁰⁵Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, [2016] AC 742, [23]

¹⁰⁶ *MeS*, *ibid* [18]

¹⁰⁷ Lord Neuberger clearly accepts these are alternatives, so in the *Braganza* context if it is obvious that the discretion was to be exercised for a specific purpose then it need not also be shown that the limitation to that purpose is necessary: *Ibid* [21].

¹⁰⁸ *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988, [27]

¹⁰⁹ Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, [2016] AC 742, [26]

contradict an express term.¹¹⁰ In this way, implication in fact (1) actively supports, and (2) is consistent with, the intentions of the parties.¹¹¹

Conversely, implication in law has no link to the intentions of the parties; it also does not require the term to be implied to be either necessary for business efficacy or obvious. Instead, Peden notes that “[c]onsiderations of justice and policy also enter the equation”.¹¹² For example, in *Crossley*,¹¹³ the Court of Appeal declined to hold that it was a term implied in law into all employment contracts that an employer should take reasonable care for an employee’s financial wellbeing. Dyson LJ held that policy implications, as well as notions of fairness and reasonableness affected the decision whether to imply a term in law, concluding, in the end, that to impose the duty of care over financial wellbeing would overburden employers, citing Peden’s article in so doing.¹¹⁴ But he made clear the test here was not necessity or obviousness, as with implied terms in fact.¹¹⁵ In addition, it is clear that the workability of any proposed implied term in law is also considered; because such terms attach to a whole category of contracts. In *Reid v Rush & Tompkins Group Plc*,¹¹⁶ the claimant asked the court to imply a term in law to the effect that his employer was obliged to warn him that he needed to arrange separate personal insurance when working abroad. Refusing to imply such a term, the court observed that the details of such an implied term would have to be hedged about with so many exceptions and have such

¹¹⁰ *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, [28]

¹¹¹ True, it is the intentions of reasonable people in the parties’ shoes that governs the tests of reasonableness and necessity or obviousness. But it seems clear from *M&S*, [28], that an expressed intention of the parties trumps what reasonable people would have thought reasonable, necessary, and obvious, such that the actual intentions of the parties still plays a significant role.

¹¹² Elisabeth Peden, *Policy Concerns behind Implication of Terms in Law* (2001) 117 LQR 459

¹¹³ *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293, [2004] ICR 1615

¹¹⁴ *Ibid*, [2004] ICR 1615, [36]; cf *Liverpool City Council v Irvin* [1977] AC 239

¹¹⁵ *Crossley*, *Ibid*

¹¹⁶ *Reid v Rush & Tompkins Plc* [1990] 1 WLR 212

complex details that such a judicial innovation would not work, and that this was really the responsibility of Parliament.¹¹⁷

Varuhas has argued that the *Braganza* duty is implied in law because it does not depend as readily on the intention (or imputed intention) of the parties as a term implied in fact.¹¹⁸ This may well be true on the facts of *Braganza* itself. To adopt McKinnon LJ's well-known thought experiment for a term implied in fact in *Shirlaw*,¹¹⁹ it is difficult to know whether, had an officious bystander suggested that the parties to the contract in *Braganza* include an express contractual term that any determination by BP should consider the inherent implausibility of suicide, BP, for its part, would necessarily have replied 'oh, of course!'¹²⁰. Moreover, the analysis of the particular contextual situation and whether the parties are to be taken as having tacitly or otherwise intended the *Braganza* controls to operate is perfunctory to nil. True, the parties conceded that a duty to act rationally applied (as already mentioned), so the need for a lengthy analysis on whether (and how) the duty arose was absent. But under Lady Hale's "The Principles" heading, in which she explains¹²¹ why the implied duty is justified in general terms, at no point does she explain why such a term passed either the "necessity" test¹²² or the "officious bystander" test.^{123 124}

¹¹⁷ Ibid 228; cf *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555

¹¹⁸ Jason Varuhas, *Judicial Review beyond Administrative Law*, available at <https://bit.ly/4807VEE> (Accessed 10 March 2022)

¹¹⁹ *Shirlaw* n52.

¹²⁰ Ibid

¹²¹ *Braganza* n8[18]-[19]

¹²² *Moorcock* n52

¹²³ *Shirlaw* n52

¹²⁴ Lady Hale does cite passages from two cases mentioning necessity. The first, *Paragon* (n17), cited at [21], involves a strong discretion and is irrelevant to analysing weak discretions. The second, *Socimer* (n16), [2008] Bus LR 1304, [66], cited at [22], involves an extremely fleeting reference to "necessary implication" and nothing more – no analysis of why the implication is necessary or relates to business efficacy, cf *The Moorcock* (1889) 14 PD 64.

However, Lady Hale does cite to wider concerns, such as the “clear conflict of interest”,¹²⁵ “imbalance of power”¹²⁶ and need to “ensure that such contractual powers are not abused”¹²⁷ as concerns which justified the courts in implying a term. This reasoning is far more policy oriented than would be the case for implication of fact. As Varuhas notes, such reasoning is far more consonant with implication in law.¹²⁸

There is a further consideration linked to fairness and justice which may justify implication of the discretion controls in law for weak discretions which has not been cited in judgments but nevertheless deserves more consideration. It is that weak discretion allows a contractual decisionmaker to step into the shoes of the court in deciding whether events triggering a legal consequence have occurred.¹²⁹ As Bridge says, weak discretions are “A Power to Evaluate the Other Party’s Contractual Entitlement”¹³⁰ – which is normally a court’s job. It is worth noting that in the other major context in which private law disputes are removed from the courts – namely arbitration – there is a statutory scheme allowing decisions to be challenged.¹³¹ There is, therefore, some precedent for the idea that, as a matter of fairness and due process, the exercise of fact-finding powers should be subject to judicial control even though the contractual decision-maker retains primary fact-finding responsibility. Admittedly, this point is not discussed openly in *Braganza*, but it forms an additional policy reason which courts and commentators might deploy in justifying implication in law of controls of fact-finding powers in contracts. It would

¹²⁵ *Braganza* n8, [18]

¹²⁶ *Ibid*

¹²⁷ *Ibid*

¹²⁸ Jason Varuhas, Three Issues in the Law of Contractual Discretion, [2022] OJLS (volume pending), 23

¹²⁹ *White and Carter Councils Ltd v McGregor* [1962] AC 413

¹³⁰ Michael Bridge, “The Exercise of Contractual Discretion”, (2019) 135 LQR 227, 241

¹³¹ Arbitration Act 1996, ss. 67-71. It is true that this statute has different grounds of challenge to those allowed under *Braganza* but the Act still stands as evidence that fact-finding powers should be subject to judicial regulation.

also explain why fact-finding powers which do not bind the courts – such as *Compass* – do not attract the implied term. All of this, taken together, suggests that, whilst the analysis in some weak discretion cases such as *Acorn* may cite the *McS* test,¹³² the better view of what is actually happening is that the control of weak discretions arises by implication of law.

But it seems difficult to adopt the implied-in-law explanation where the discretion is a discretion to decide what to do - a strong discretion, as in *Gan* or *TAQA Bratani*. Here the *McS* approach is rigorously applied (albeit some cases such as *Gan* do still pass the necessity threshold). *Equitas Insurance*¹³³ involved the successful implication of a term controlling how insurers were supposed to present their claims to re-insurers in the wake of the House of Lords' decision in *Fairchild v Glenhaven*¹³⁴ and the Compensation Act 2006. The *Equitas Court* held that in deciding how to present their claims (in particular, in which year) to reinsurers, a *Braganza* control applied and required the insurers to present claims on a pro-rata basis to re-insurers, rather than heaping all the liability onto one reinsurer for one year. But the court, although motivated to some extent by considerations of fairness, he made clear that whether or not a power was a discretion or an absolute contractual right was a matter of construction,¹³⁵ and the implication of a term was necessary to protect 'the presumed intentions and reasonable expectations'¹³⁶ of the parties. This sounds far more like an implication in fact than anything in Lady Hale's *Braganza* judgment.

¹³² And then only briefly *Acorn* n73, [58]-[59]

¹³³ *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718

¹³⁴ *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32

¹³⁵ *Equitas* n133, [114]

¹³⁶ *Ibid* [114]

There are two further reasons why control of strong discretions can only be implied, when they arise, in fact.

First, start with Varuhas' suggestion that *Braganza* controls arise over even strong discretions.¹³⁷ This may have some support from Lord Sumption's obiter dicta in *BT*¹³⁸ to the effect that where a contract creates a discretion, courts imply a duty to act rationally – a dicta on which Lady Hale relied in *Braganza*.¹³⁹ The problem with this is that whether something is a 'strong discretion' or an 'absolute right' is itself governed by what the parties are supposed to have intended. We have already seen from *TAQA Bratani* and *Lomas* that some powers to decide what to do are unfettered absolute rights rather than mere discretions. In these cases, a commercial context justified a finding that the parties did indeed intend (in the *Arnold v Britton*¹⁴⁰ sense) to create an absolute right to terminate. But this means that the statement that, once a contractual discretion exists, the intention of the parties is irrelevant to deciding whether *Braganza* duties apply becomes completely meaningless once you accept that the parties' intentions are relevant (and subject to legislation, controlling) to deciding whether the power in question is a discretion in the first place, or an absolute right. By saying that the *Braganza* controls apply by operation of law, regardless of party intention to all exercises of contractual discretion, Varuhas falls into the trap of question begging. The question being begged is 'what is the legal test for distinguishing between a contractual discretion and an absolute right?' The answer to that question, at least for strong discretion, is "when the parties so intend"¹⁴¹; but that answer just renders Varuhas' whole argument self-contradictory. It amounts to saying that *Braganza* controls discretion regardless of the parties' intention, but the parties' intention controls whether a case is

¹³⁷Varuhas n128, p.22

¹³⁸ *BT* n17, [37]

¹³⁹ *Braganza* n8, [28]

¹⁴⁰ *Arnold v Britton* [2015] UKSC 36, [2015] 2 WLR 1593, [15]

¹⁴¹ Again, in the sense "intention" is normally used in the interpretation of written contracts; *ibid* 15

a discretion in the first place. It is far easier just to accept that because party intention controls whether something is a strong discretion, rather than an absolute right, *Braganza* controls over strong discretion therefore necessarily do depend on the intentions of the parties and are therefore implied (when they arise) in fact rather than in law.¹⁴²

Second, the cases where strong discretions have been held subject to the *Braganza* duty can usually be explained on the ground that the control is necessary to support the working of the contract once the meaning of the express terms has been fully appreciated.¹⁴³ To illustrate, consider *BHL v Leumi*.¹⁴⁴ BHL owned the Cobra beer brand, which had gone into administration. When that happened, Leumi (to whom Cobra owed substantial debts) stepped in to complete payments by a number of Cobra's customers who still owed Cobra money. They did this pursuant to an agreement allowing them to charge a collection fee of 'up to 15%'¹⁴⁵. Judge Pelling held that Leumi's power to charge up to 15% was subject to *Braganza* controls. Judge Pelling observed that it would be an 'absurd interpretation'¹⁴⁶ that held the charging power to uncontrolled, because, were that so, Leumi would always charge 15%. But the contract used the words 'up to 15%'. Although Judge Pelling does not say this explicitly, such language suggests that BHL were at the very least entitled to a real chance of being charged less than 15%, as opposed to a wholly fanciful one. It was therefore necessary – in the *McS* sense – to imply a *Braganza* control here. It is in this sense that Judge Pelling was right to say that an unlimited power would have gone against the 'clear language actually used'.¹⁴⁷ What is clear, however, is that this result was reached by looking to the intentions of the parties, and what was necessary to

¹⁴² See also *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District* [2021] SCC 7, [128]-[135] (Brown and Rowe JJ, concurring specially)

¹⁴³ Peel n101 [6-078]

¹⁴⁴ *BHL v Leumi* [2017] EWHC 1871 (QB)

¹⁴⁵ *Ibid* [11]

¹⁴⁶ *Ibid*, [35]

¹⁴⁷ *Ibid*; M Bridge, "The Exercise of Contractual Discretion", (2019) 135 LQR 238

protect the chance of BHL being charged lower than 15% that the contract clearly intended.

This is thus a clear example of implication in fact.¹⁴⁸

All of this shows that the *Braganza* duty applies to strong discretion only where the parties so intend, and that therefore it arises in relation to strong discretion as a term implied in fact (when and because the parties intend it to arise) and does not arise by implication in law. One major implication of this is that should be much harder (assuming it to be possible) to exclude the control of weak discretions than to exclude strong discretions, because clear words are necessary to exclude terms implied in law, and that is assuming that terms implied in law can be excluded at all.¹⁴⁹ Conversely it is clear that implication in fact only ever takes place after all the express terms have been fully interpreted, and no term implied in fact can conflict with such an express term,¹⁵⁰ so, if (as is submitted) control of strong discretion is only implied in fact, it follows that it should be fairly easy to exclude control of such discretions.¹⁵¹

2. What does review look like when *Braganza* does apply?

The previous section has looked at whether *Braganza* applies. This section assesses *how* it applies, and to what extent *Braganza* has actually changed the law. I draw two conclusions: first,

¹⁴⁸ Conversely in other cases implication of a term may not be necessary to preserve the possibility of a discretion being exercised more favourably to the other party, eg *TAQA Bratani* and *Lomas*, where, depending on how things transpired after the contract is signed, it might often be in the decisionmaker's interest to act favourably towards the other party. But in a charging case like BHL, it will always be in the other side's interest to charge as much as it can.

¹⁴⁹ *Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2019] EWHC 347 (Comm), [37], cited Peel, [6-079]

¹⁵⁰ *M&S* n104

¹⁵¹ Cf *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718, where the words "absolute discretion" did not exclude *Braganza*.

review under *Braganza* varies in intensity, and second, because of *Braganza*, courts feel far more emboldened to impugn contractual decision-making because of a defective reasoning process.

a. Intensity of review

Varuhas correctly notes that intensity of review clearly depends on the scope of the power, the expertise of the decisionmaker, and, subject to some caveats, whether the contract can be described as relational.¹⁵²

In *Braganza* itself, the approach to review was far more nuanced than the sort of analysis envisaged by Lord Greene in *Wednesbury*. One could hardly equate the Team's failure to require cogent evidence before making a finding of suicide to the act of firing a teacher because they have red hair. Albeit the Court's approach in *Braganza* was far from a de novo review of the Team's findings, the introduction of the judicial approach to inherent probabilities, coupled together with requiring the Team to find cogent evidence before concluding that suicide was the cause of Mr Braganza's death, went far beyond what Lord Greene envisaged.

Indeed, saying that, whilst *Wednesbury* is the headline test, a finding of suicide may only be made if BP has cogent evidence can be compared to saying, as Lord Bridge did in *Brind*, that Gerry Adams' voice could only be taken off-air if an important competing interest to free speech could be identified. In each scenario, the court maintains *Wednesbury* as the headline test, but requires an aspect of the decisionmaker's thought process to come up to a higher standard than that which Lord Greene appeared to envisage in *Wednesbury*. From this it is clear that *Braganza* is more like the modern *Wednesbury* review than the traditional 'red-hair' type. So too in *Acorn*. As previously mentioned, the contract required the insurer to waive any non-disclosure which had

¹⁵² Varuhas n128, 11

been shown ‘to [their] satisfaction’, not to have been intentional. In a similar vein to *Braganza*, Judge Pelling held that in deciding whether a failure to disclose was intentional or not, the insurer was bound to recognise that intentional non-disclosure was inherently improbable, and needed cogent evidence to prove. Again, therefore, the decisionmaker’s findings were set aside.¹⁵³

However, the following cases of strong discretion show a far greater reluctance to interfere.

*Paragon*¹⁵⁴ involved a mortgage whereby the mortgagee (Paragon) was entitled to vary the amounts due for payment from the mortgagors (Staunton). In due course it increased the repayment amounts well above the market rates, so much so that the Stauntons were in arrears and were sued by Paragon. The Stauntons argued that Paragon was obliged to exercise the power to increase rates rationally, and not capriciously or arbitrarily, and the decision to increase rates well beyond market rates was thus unsustainable. Although the Court of Appeal accepted that the obligation not to act irrationally applied, they had no difficulty in upholding Paragon’s decision. Paragon had fallen into dire financial straits after many customers had defaulted their loans, making it impossible for Paragon themselves to get credit. It followed that the decision by Paragon was rational simply because it was ‘motivated by purely commercial considerations’.¹⁵⁵ As Dyson LJ pithily observed, ‘the bank is not a charitable institution’.¹⁵⁶ That the bank was motivated by self-interest was proof of the decision’s rationality, not its irrationality. This review

¹⁵³ It is unclear though whether discretions involving evaluations of fact as opposed to determining facts attract this level of scrutiny; see *Brogden and Reid v Investec Bank Plc* [2014] EWHC 2785 (Comm)

¹⁵⁴ *Paragon Finance Plc v Nash and Staunton* [2001] EWCA Civ 1466, cited in E McKendrick, “Judicial Control of Contractual Discretion”, in M Freeland and J-B Auby (eds), *The Public Law / Private Law Divide: Une Entente Assez Cordiale?* Bloomsbury 2006, 195

¹⁵⁵ *Ibid* [2001] EWCA Civ 1466, [47]. *Cf BHL* n144

¹⁵⁶ *Ibid*

is clearly of a far lighter touch than that in *Braganza*. Indeed, Dyson LJ accepted that the result was ‘harsh’ and that the amended rates might be thought unreasonable in the sense of ‘excessive/extortionate’¹⁵⁷. But that did not make Paragon’s decision irrational.

Although *Paragon* preceded *Braganza*, it was cited by Lady Hale with approval, and therefore remains good law.¹⁵⁸ Post-*Braganza*, it was approved by the Court of Appeal in *Property Alliance Group v RBS*.¹⁵⁹ There, the contract allowed RBS to commission a valuation on properties owned by PAG but subject to a charge in RBS’ favour. The contract required PAG to pay the costs of such valuation even though the decision to commission such a valuation rested with RBS. Although the Court of Appeal held that *Braganza* required the discretion to be exercised rationally, the commissioning decision by RBS was upheld because RBS had a legitimate commercial interest in the valuation, even assuming that, by the time RBS commissioned it, they were unlikely to agree to further refinancing. Notably the Court gave as its example of an irrational discretion a malicious desire to vex PAG (ie pure spite) as opposed to acting in legitimate commercial interests (i.e. accumulation of profit).¹⁶⁰ Whilst this example was not exhaustive, it is strongly indicative of how high the bar for irrationality is in this context. Such a strong showing would no doubt have been *sufficient* in *Braganza* and *Acorn* to justify the court’s interference, but it plainly would not have been (and was not) necessary.

Applying *PAG*, Kerr J in *Morley*¹⁶¹ similarly dismissed a challenge by a property developer to a mortgagee bank’s decision to increase interest rates and call for a revaluation of the charged assets after the relationship between the bank and the developer had broken down.

¹⁵⁷ *Ibid*

¹⁵⁸ *Braganza* n8 [21]

¹⁵⁹ *Property Alliance Group v RBS* [2018] EWCA Civ 355, [2018] 1 WLR 3529

¹⁶⁰ *Ibid*, [169]

¹⁶¹ *Morley Estates v RBS* [2020] EWHC 88 (Ch), *affirmed* [2021] EWCA Civ 338.

Notwithstanding the bank realising that its decision would ‘infuriate’¹⁶² Mr Morley, the developer, the fact that this decision was not taken *in order to infuriate* him but for its own commercial interests, was fatal to the claim. Again, this suggests that it is almost impossible in the commercial context to prove substantive irrationality without showing improper purpose, and that even here the fact that a result is certain to cause harm to a party is not enough; it must be shown that the decisionmaker’s *purpose* was to cause harm.¹⁶³ The sort of case required to reach this threshold would surely be exceptional.

In light of these cases it seems that, in the commercial context, the level of deference applied to rationality review is such that, in practice, *Braganza* rarely adds anything that would not already have been amenable for challenge for an improper purpose.¹⁶⁴ Contrast that with the weak discretions, where it is clear that the change heralded by *Braganza*, and the transplant of the *Wednesbury* test, clearly does make a difference; it would be impossible to rationalise either *Braganza* or *Acorn* as involving an improper purpose.

Against that background, it is hard to agree with Varuhas’ suggestion that a decision will necessarily be set aside if it was taken in abusive self-interest.¹⁶⁵ One would think that setting rates at a very high level without the other party’s consent (in *Paragon*) would come under what most ordinary people would consider abusive. If abusive self-interest just means behaviour that most people would think abusive or exploitative, then it is hard to see how Varuhas is correct in

¹⁶² Ibid [154]

¹⁶³ Unlike in, say, criminal law: *R v Woollin* [1999] 1 AC 82 (HL).

¹⁶⁴ P Sales, *Use of Powers for Proper Purposes in Private Law* (2020) 136 LQR 384, 396

¹⁶⁵ Varuhas n128, p. 14, citing *Socimer* n16 [116].

his assertion that ‘abusive self-interest’ is always an unlawful exercise of discretion, even in the commercial context. The highest one might be able to put it is that *some* commercial contracts (such as the one in *Socimer*) might prohibit ‘abusive’ behaviour, but if *all* commercial contracts that were subject to the *Braganza* duties were held to prohibit abuse in this general sense, it is hard to see why *Paragon* was decided as it was. *Paragon* proves that even where *Braganza* applies it is still possible to have a rational and *Braganza*-compliant use of the discretion that is self-interested, even abusively so.

One case that might support Varuhas’ argument is *Equitas* (discussed above in relation to implied terms), which he cites (alongside *Socimer*) as authority for his proposition against abusive self-interest. Recall that this case concerned how insurers should prevent their claims stemming from pay-outs following the House of Lords’ *Fairchild* decision. Males LJ held that implication of *Braganza* led to the conclusion that the insurers’ discretion to choose in which year to present their claim should be exercised rationally. He held that the only rational way to exercise this discretion was for the claims to be presented to reinsurers so as to spread the net loss among them pro rata, on a time to risk basis. Despite the fact the contract contained no such express limit, the level of deference afforded to the insurer was as low as it gets, especially bearing in mind that Males LJ accepted rationality to be the test. This is further evidence that rationality review under *Braganza* varies contextually; the very limited ambit of discretion in *Equitas* is a far cry from *PAG*, and stems from the unique and unforeseen consequences of *Fairchild*. Whether the Court of Appeal decided *Equitas* correctly is considered in Chapter II, but for now, it certainly shows that the standard of review can vary.

Varuhas has also argued that, where it is possible to point to a purpose for the contractual discretion, it will be easier to show that a discretion has been unlawfully exercised if the ‘purpose’

has been exceeded.¹⁶⁶ This is correct. For instance, the discretion conferred in *Gan* was for the limited purpose of protecting the reinsurer from paying out claims that the initial insurer ought to have contested, and it is clear that any exercise by Gan of that discretion had to be rationally connected to that purpose. Conversely, it is unclear that the discretion to increase charges in *Paragon* existed for a particularly specific purpose, as was the case in *Gan*.¹⁶⁷ In this limited sense it may be possible to say that abusive self-interest is prohibited. *If* the discretion has a particular purpose, and *if* that purpose is exceeded, the party has behaved abusively and the challenge to the exercise of discretion succeeds.¹⁶⁸ But beyond that, it is difficult to avoid the conclusion that abusive self-interest is a conclusory label that describes a decision that fails on ordinary *Braganza/Wednesbury* principles, but which does not independently add anything.

It should also be added that a line of cases on review of decisions by political parties, such as to suspend members for misconduct, establishes that review of such decisions on substantive grounds is highly deferential, given the mandate of the political party's elected committee.¹⁶⁹ This area is discussed in greater depth in Chapter II.

b. Reasoning process

A major change to the review of contractual discretions post-*Braganza* has been that courts seem more willing to interfere because of concerns about the decision-maker's reasoning process.

¹⁶⁶ Ibid 11

¹⁶⁷ See also *Faieta v ICAP* [2019] EWHC 2995 (QB)

¹⁶⁸ Paul Davies, Excluding Good Faith and Restricting Discretion in Davies and Raczynska (eds), *Contents of Commercial Contracts: Terms Affecting Freedoms* (UCL 2019), 106-107

¹⁶⁹ *Rothery v Evans* [2021] EWHC 577 (QB), [177], *Williamson v Formby* [2019] EWHC 2639 (QB)

Before *Braganza* it was reasonably clear that the term implied to control contractual discretions would prevent extraneous matters from being taken into account.¹⁷⁰ What was unclear was whether this also required a decisionmaker to take all relevant matters into account; in *Braganza*, the Court of Appeal had effectively answered ‘no’ before the Supreme Court reversed.¹⁷¹ *Braganza* in the Supreme Court was followed in *Acorn*, analysed above.¹⁷² *Braganza* and *Acorn* to some extent staddle the line between process and outcome (notwithstanding *Braganza* was reasoned as a ‘process’ case); one could say equally that BP failed to consider the inherent improbability of suicide or that in the absence of cogent evidence the finding by BP of such an inherently improbable event was one no reasonable decisionmaker could have reached. To repeat Lord Greene in *Wednesbury*, challenges to process and outcome often ‘all run into one another’.¹⁷³

That said, post-*Braganza*, there are clear examples of courts using purely process-based reasoning to uphold a challenge to a decision. *Watson v Watchfinder*¹⁷⁴ involved an option to purchase shares in a company (Watchfinder) which could be vetoed by Watchfinder’s board of directors. The directors vetoed a number of claimants from exercising their options. After holding that *Braganza* limited the exercise of the veto, HHJ Waksman QC held that the exercise of discretion had been defective. In his view the discretion was limited to deciding whether the claimants had made significant past contributions to Watchfinder to have now ‘earned’ their

¹⁷⁰ Gan n17

¹⁷¹ *Braganza* n11, [20]

¹⁷³ *Wednesbury* n9, 229

¹⁷⁴ *Watson v Watchfinder* [2017] EWHC 1275 (Comm), [2017] Bus LR 1309

option. He then found that no real thought had been given to this at all, and some of the previous investments had not been considered. He set aside the veto.

BHL was another case before Judge Waksman and has been discussed above in relation to the implication of terms. As a reminder, Leumi had the power to charge a collection fee of up to 15%, which they predictably exercised. Having held (see above) that *Braganza* applied, Judge Waksman went on to impugn the charging decision, holding that Leumi had failed to give any thought to charging any less than the 15% maximum, and failed to address their mind to the likely cost of Leumi's collection which was certain to be lower than 15%.¹⁷⁵

In both of these cases it is clear that Judge Waksman applied a process-based rationale, but what is striking about that is that once he had concluded that the process was defective and the decision under challenge was thus 'out of the way', that allowed him, effectively, to make his own mind up about how the discretion should be exercised. In *Watson*, that meant there was no valid exercise of the veto, so specific performance of the option was decreed, and in *BHL*, Judge Waksman concluded that a proper exercise of the discretion would have led to a charge of 4%. In *BHL*, given that Judge Waksman there concluded that the purpose of the discretion was to reflect likely costs accruing to Leumi, it was probably correct to hold that 4% was the highest Leumi could have lawfully charged. But in *Watson*, by contrast, it is unclear that, had a proper reasoning process been followed, the board would necessarily have allowed the option to be exercised. Yet specific performance was still awarded, potentially granting a windfall to the claimants.

¹⁷⁵ *BHL* n144, [77]-[89]

This last point is crucial because by successfully challenging a decision on process grounds, the claimants in *Watson* obviously did not need to show that the outcome was irrational, and (it seems) also did not have to show that using the right process would have actually changed the outcome. Given the commercial context, one assumes that, for review of the outcome, the light-touch review exemplified by a cases like *PAG/Paragon* would have applied to *Watson*, rather than the more interventionist *Braganza*. Remember that, in *PAG*, the indicative example of substantive irrationality was really a scenario involving improper purpose – commissioning valuations in order solely to vex the other side. If that were the bar in *Watson* a substantive irrationality argument would surely fail. But Judge Waksman, in impugning the *process*, as well as by limiting the relevant considerations to the exercise of the discretion, avoided the need to meet the high bar for substantive irrationality that *PAG* would have suggested for *Watson* and *BHL*. That is why an increased willingness to review process post-*Braganza* is so important. Given the standard of review for strong discretions in commercial contracts remains high, an increased willingness to look at process is a clear benefit to claimants.

It is therefore clear that there is some variation in the standard of review under *Braganza*. In particular, there is a clear variation depending on the nature and purpose of the discretion. The extent to which this is justified, should be scaled back, or should go further is explored in Chapter II.

D. Descriptive Conclusions

This chapter discussed the *Braganza* decision, and made sense of its impact in the lower courts. It has explained how *Braganza* cites Lord Greene's judgment in *Wednesbury* as the gold standard in Administrative Law notwithstanding that *Wednesbury*'s application in Administrative Law is (a) continuously evolving, and (b) highly controversial. It has shown how *Wednesbury* is a variable standard in Administrative Law, and shown that the early indications – both before and after *Braganza* - suggest that review of contractual discretions in *Braganza* is much the same. Of particular importance to the intensity of review in the contractual context is the nature of the power in question, especially whether the discretion is strong or weak.

That discussion has now set the stage to consider more normative aspects of the *Braganza* duty. There are several questions one could ask, but the main focus going forward will be on whether the transplant of the *Wednesbury* framework into Contract Law has sufficiently realised the different ethic of Contract Law. Indeed, many of the problems discussed in chapter II have their origin in the Supreme Court's decision to transplant *Wednesbury* into Contract Law without regard to the absence of any general philosophy in Contract Law that parties ought to behave honourably.¹⁷⁶

CHAPTER II – SHOULD INTENSITY OF REVIEW UNDER *BRAGANZA* BE VARIABLE OR FIXED?

¹⁷⁶ Although Administrative Law does not necessarily police the honour of Minister's conduct directly, it is clear that good public administration is a background principle that influences how judges shape public law: see inter alia *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363, [68]

This Chapter evaluates *Braganza* review from a more normative standpoint. In particular, it questions whether a full transplant of *Wednesbury*, including variable review, and the duty to take account of all relevant matters and exclude all extraneous matters, would be problematic in Contract. Legal transplants on the international plane can ‘fail’ when they fail to take account of the ‘social, cultural, political, economic and legal context’ of the donee jurisdiction.¹⁷⁷ Applying this by analogy to the domestic context, between contract law and administrative law, two differences are of note: contract’s willingness to accept commercial self-interest as a motive for action, and, linked to this, contract’s preference for hard rules over flexible standards. Given these concerns, the transplant of variable intensity review poses problems. Adopting Lim and Chan’s approach, I suggest that, whilst rationality review should continue, the starting point should be the light-touch approach of Lord Greene in *Wednesbury* itself. Any exceptions to this by way of varying review should be clearly defined, and I argue there are two categories of case where more intense review is appropriate: first, cases where a contractual discretion has a clear purpose in view, and second, where weak discretions are involved. As to the former, I also suggest that the analysis of whether the contractual discretion has a ‘purpose’, in the current law, lacks structure, and that a finding that a contractual discretion may only be exercised for a particular purpose should only be made where a term to that effect can be implied in fact according to the conventional *McS* test.

A subsidiary theme becomes apparent when discussing ‘improper purpose’ review. In effect, whilst *Braganza*, to be decided how it was, did require recourse to the transplanted *Wednesbury* doctrine, courts should not, in the main, seek to borrow other doctrines wholesale from Administrative Law to control contractual discretion without first considering whether

¹⁷⁷ C Kenefick, Looking Afresh at the French Roots of Easements in English Law, in W Eves et al (eds), *Common Law, Civil Law, and Colonial Law* (Cambridge 2021), 202

bread-and-butter Contract Law already provides a fair answer. This point does not run through the whole of this chapter, but it does surface now and again.

In part A, we will see how Contract Law generally prefers to guarantee legal certainty through rules, or very clear standards, unlike administrative law, which prefers the flexibility of more flexible standards (of which *Wednesbury* is but one example). We will also see how Contract Law affords a far greater scope in principle for a party to promote their self-interest, a facet which still survives *Braganza*. In part B, the implications of this for *Braganza* will be explained. Based on this, I will here reject more intense review for ‘relational contracts’, and cases where a court thinks it has more institutional competence. I accept that variable scrutiny is acceptable where categories can be more closely defined. In part C, I discuss what those categories should be. The distinction between strong and weak discretion will be shown to be a sufficiently clear one to attract variation of the standard of review, as should cases where, in addition to *Braganza*, an implied term exists that the contractual discretion should only be used for a particular purpose. Although some room therefore exists for variable intensity, there is a lot less room than Administrative Law.

A. The Different Ethics of Contract Law and Administrative Law

This section highlights two differences between the social, economic, and legal background of Contract Law and Administrative Law which have a bearing on the wisdom of transplanting *Wednesbury* into Contract Law. The first is Contract Law’s general reluctance to impose overly onerous duties of good faith, and acceptance of self-interest as a valid motive for action. The second is Contract Law’s normal preference for rules compared with Administrative Law’s willingness to use open and contextual standards and principles (of which *Wednesbury* is a case in point).

1. The Different Approaches to Good Faith and Self-Interest in Contract Law and Administrative Law

Administrative Law clearly looks harshly on the administration acting in bad faith or self-interest as explained below. However, the traditional view in contract— that there is no general principle of good faith and that parties are free to conduct themselves in a way that furthers their self-interest stands in marked contrast.¹⁷⁸ Moreover, such an approach has not been expunged even in the *Braganza* context; notwithstanding Varuhas’ suggestion that ‘abusive self-interest’ is not allowed,¹⁷⁹ it is far from clear what this actually means or what it adds to the general statement that contractual discretions must be used rationally and not for an improper purpose. The problem is that labels such as “abusive self-interest” are not self-defining; they require examples.

The position in Administrative Law is discussed succinctly by Craig; administrators cannot act in bad faith.¹⁸⁰ Craig’s main point is that it is unclear whether a separate head of review for “bad faith” is even necessary in Administrative Law, for any instance of bad faith would surely be caught by one of the other grounds of review. He also adds that it may be harder to oust judicial review for bad faith than some of the other grounds of challenge such as error of law.¹⁸¹ But one way or another, it is clear that bad faith in Administrative Law is prohibited.

¹⁷⁸ P Sales, “Use of Powers for Proper Purposes in Private Law, (2020) 136 LQR 384, 386; *SNCB Holding v UBS* [2012] EWHC 2044 (Comm), [73], citing *White and Carter (Councils) v McGregor* [1962] AC 413 (HL), 431, 445

¹⁷⁹ Varuhas n128 p 14

¹⁸⁰ Craig n47 [19-020]

¹⁸¹ Ibid

In contract law, however, the position is quite different. In English Law there is no general principle of good faith in contract; the major innovation made by Leggatt J in *Yam Seng* was to allow for a duty of good faith to be implied in certain specific situations. Earlier cases seem even more hostile to good faith, such as *Walford v Miles* in which an agreement to negotiate a future contract in good faith was held to be unenforceable on the ground of uncertainty.¹⁸²

It is true that in the *Braganza* context, a duty of good faith is part of the implied term to act rationally, and in *Socimer* as Varuhas noted¹⁸³, Rix LJ held that abusive self-interest was prohibited. But the impact of this in practice is unclear when one looks to cases such as *PAG*, *Paragon*, and *Morley*. It is clear from these cases that a party is entitled to act extremely selfishly without acting either (a) irrationally or (b) in bad faith. From these cases it can be safely inferred that even when contract law does accept in principle that a duty of good faith may apply, contract law's traditional hostility to good faith still limits how exacting that duty in practice will be. Although other cases such as *BHL* and *Equitas* allow more of a role for good faith, it is precisely this tension in the case law that may contribute to a predictability problem in contract law. This is discussed in the second part of the chapter.

I should lastly refer to Dawn Oliver's contribution on the similarities between public and private law, if only to dismiss its application to the *Braganza* context. Oliver's broad argument is that public and private law shares common values, including a desire to control abuse of power.¹⁸⁴ To that end, she refers to the law on contractual discretion as an example.¹⁸⁵ However,

¹⁸² *Walford v Miles* [1992] 2 AC 128

¹⁸³ J Varuhas, n128, 14

¹⁸⁴ Dawn Oliver, *Common Values and the Public-Private Divide* (Butterworths 2019), ch 1

¹⁸⁵ *Ibid*, ch 8

she was writing in 1999, when the law was embryonic at most. Most of the pre-*Braganza* background – including *Paragon*, *Gan*, and *Socimer*, had yet to reach the courts let alone *Braganza* itself. Although *Braganza* itself would have supported Oliver’s broad argument, the fact she wrote in 1999 means she does not consider how commercial self-interest plays a clear role in *Paragon* and most recently *PAG*, and how this limits the role that control of abuse of power can really play in practice, particularly in strong discretion cases of the *PAG* type.

2. Contract’s Preference for Rules or Very Clear Standards in Ascertaining Primary Obligations

Linked to contract law’s acceptance of rational self-interest, contract law also shows a marked preference for rules and very clear standards telling contractual parties how to act. Administrative Law, conversely, allows far more room to assess the government’s conduct by reference to very flexible standards.

a. Rules v Standards generally

As a general definition, a standard allows for considerable judicial evaluation, whereas rules do not. Hence, the *Wednesbury* test is a standard because it requires a court to evaluate what factors in a decision are relevant or irrelevant, and to evaluate the rationality of the decision made. Further examples of standards include the duty to take reasonable care in tort,¹⁸⁶ and, admittedly, the *McS* test for an implied term itself, because under that test a court must evaluate the necessity and obviousness of the proposed term. Conversely, rules require minimal to no

¹⁸⁶ *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781, 784, cited in J Goudkamp and D Nolan, *Winfield and Jolovicz on Tort*, 20th Ed (Thompson Reuters 2020), [6-001]

evaluation, such as the rule that consideration must be sufficient (of some minimal legal value) but need not be adequate (ie a reasonable price for the thing promised).¹⁸⁷

Bayern argues that a system based more on rules than standards is generally more likely to promote legal certainty.¹⁸⁸ It is easy to see why; an absolute rule that consideration need not be adequate for the thing exchanged means that parties agreeing a price are not drawn into worrying about whether the judge might think that their price is too low or too high, given the level of subjectivity such an enquiry involves. Adams and Brownsword also support this argument, explaining that an individualistic conception of Contract Law favours clear rules because they help people “know where they stand”.¹⁸⁹

Against that background, one might assume that Administrative Law places less emphasis on legal certainty, an assumption to which Lim and Chan allude.¹⁹⁰ But one need not necessarily go that far. Instead, I suggest that whilst predictability and thus a degree of legal certainty is important to Administrative Law, Administrative Law has found other ways to protect these values than clear legal rules. So understood, legal certainty and the need for a predictable legal system take on a different hue in Administrative Law which does not place nearly as much emphasis on preferring rules to standards.

Indeed, flexible standards in Administrative Law are often used to increase the predictability with which the government will act towards private citizens.¹⁹¹ That said, this concession should not be used to undermine the key claim being made here: contract law’s

¹⁸⁷ *Chapell v Nestle* [1960] AC 87 (HL)

¹⁸⁸ S Bayern, “Against Certainty” (2013) 41 Hofstra LR 57

¹⁸⁹ Adams and Brownsword, *The Ideologies of Contract*, (1987) 7 LS 205, 207, Lim and Chan, (2019) 135 LQR 88, 98

¹⁹⁰ *Ibid*

¹⁹¹ John Braithwaite, “Rules and Principles: A Theory of Legal Certainty”, (2002) 27 AJLP 46

preference for clear rules over flexible standards poses a problem for the *Wednesbury* transplant because clear rules are the way that Contract Law promotes predictability, even if Administrative Law picks a different route to a similar end.

b. Concrete Examples of Rules and Standards in Contract Law and Administrative Law

This discussion will seek to develop the point that contract law generally prefers clear rules to flexible standards, particularly where primary obligations are concerned. In administrative Law, however, courts are quite comfortable employing flexible standards over both primary and secondary obligations. A primary obligation defines what a party must do; a secondary obligation spells out what happens if they fail to do it.¹⁹² The *Braganza* duty is a primary obligation.¹⁹³

Adams and Brownsword posit two different ideologies in Contract Law: market individualism and consumer welfarism.¹⁹⁴ Market individualism corresponds to the traditional, laissez-faire, model of contract law explained above: no good faith, and a generous scope for parties to act in their own interests. Welfarism, on the other hand, seeks to redress power imbalances and thus affords a court a more interventionist role to address bad behaviour which

¹⁹² *Photo Production Ltd v Securicor* [1980] AC 827, 847-849

¹⁹³ That said, for weak discretions, the *Braganza* duty has mild flavours of a secondary obligation, adopting the point in Chapter I that in a weak discretion case, the contractual factfinder to some extent steps into the shoes of the court in deciding the facts.

¹⁹⁴ Adams n189

does not fit within an established rule.¹⁹⁵ Linked to this, the market individualist (*laissez-faire*) ethic generally prefers rules, and very clear standards, over vague and flexible standards.

As examples of clear rules (market individualism) they cite the consideration example already given; they also point to the postal acceptance rule and the orthodox approach to the battle of the forms¹⁹⁶ as other examples. To this might be added the law on common mistake given the overruling of *Solle v Butcher*;¹⁹⁷ the rule that unilateral mistake cannot affect the validity of a contract unless the mistake is as to the terms,¹⁹⁸ and the clear rules on third party enforcement, first at common law and more recently under the Contracts (Rights of Third Parties) Act 1999. In each of these situations, the primary obligation is couched in the clear terms of a rule, so parties know what to do to stay just on the right side of the law; even though that may produce injustice.

True, they cite examples of standards being used in Contract Law, some of which are vaguer than others. For instance they cite the caveat to *White and Carter v McGregor*¹⁹⁹ that a party may not be able to claim an agreed sum if it is wholly unreasonable to do so,²⁰⁰ the more flexible approach to termination for breach of an innominate term heralded by *Hong Kong Fir Shipping v Kawasaki*²⁰¹ and the penalties doctrine.²⁰² To this might also be added the remoteness test, by

¹⁹⁵ Ibid

¹⁹⁶ Adams n189, 214, citing *Butler Machine Tool Co Ltd v Ex Cell-O Corp* [1979] 1 All ER 965. See also *Henthorn v Fraser* [1892] 2 Ch 27, cf *Byrne v van Tienhoven* (1880) 5 CPD 344

¹⁹⁷ *The Great Peace* [2002] EWCA Civ 1407, [2002] 3 WLR 1617, overruling *Solle v Butcher* [1950] 1 KB 671 (CA)

¹⁹⁸ *Smith v Hughes* (1871) LR 6 QB 597

¹⁹⁹ *White and Carter v MacGregor* [1962] AC 413 (HL)

²⁰⁰ *The Alaskan Trader* [1984] 1 All ER 129 (CA)

²⁰¹ *Hong Kong Fir Shipping v Kawasaki* [1962] 2 QB 71 (CA)

²⁰² *Cavendish Square BV v Makdessi, ParkingEye v Beavis* [2015] UKSC 67

which a contract claimant will not be able to recover for losses that can neither ‘fairly and reasonably’²⁰³ be considered to have arisen naturally, nor ‘reasonably be supposed to have been in the contemplation of both parties’²⁰⁴ as a likely result of breaching it at the time they entered the contract. But common to all these examples is that they really concern secondary obligations, i.e., what happens when a contract is breached, rather than primary obligations, ie what the parties must do to begin with. Ultimately then, contract law still prefers clear rules that tell parties what to do, even if there is room for vague standards in deciding what happens if one of the parties does not do what the clear rules tell him to do.²⁰⁵

The strongest example of Contract Law using a vague standard to determine a primary obligation is the Unfair Contract Terms Act 1977, which provides that certain contractual provisions may be set aside if they are unreasonable. As the House of Lords held in *George Mitchell*,²⁰⁶ the reasonableness test requires a multifactorial analysis which could not be set aside on appeal unless it was wrong in principle or “plainly and obviously wrong”.²⁰⁷ However, two points may be made. First, the case arose out of a statutory provision – the 1977 Act – which imposed the test of reasonableness, removing the common law which had gone before. Given this was an imposition from outside Contract Law (ie Parliament), it is of limited use in seeing what attitudes actors within the system (barristers, commercial parties, judges, and commentators) take. Secondly, *George Mitchell’s* interpretation of UCTA has not been wholly positive. In a separate piece, Adams and Brownsword themselves deprecated the uncertainty the test has created.²⁰⁸

²⁰³ *Hadley v Baxendale* (1854) 156 ER 151

²⁰⁴ *Ibid*

²⁰⁵ Cf P Birks, *Rights, Wrongs, and Remedies* (2000) 20 OJLS 1, 23

²⁰⁶ *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, 816

²⁰⁷ *Ibid*

²⁰⁸ John Adams and Robert Brownsword, “The Unfair Contract Terms Act: A Decade of Discretion” (1988) 104 LQR 94

Another example of a standard being used in ascertaining a primary contractual obligation is *MeS* itself. However, key to why this does not damage legal certainty in contract law is that the bar for the implication of a term in fact, as we have seen, is set very high.²⁰⁹ There is therefore very little scope for the *MeS* test to give rise to much uncertainty in practice, because a term will not be implied unless the case is clear. Below I explain that much the same point can be made about *Wednesbury* and *GCHQ* as initially formulated, such that keeping the original *Wednesbury* test in Contract Law should not prove much of a problem, but it is unclear that the same is true of the more modern approaches to *Wednesbury* review.

What this collection of cases shows is that Contract Law prefers clear rules to govern the content of a party's primary obligations, or very clear standards which keep the level of evaluation required to a minimum (as in *MeS*). This corresponds with the ideology of market individualism identified by Adams and Brownsword; with the acceptance of rational self-interest throughout contract law; and the tepid-at-best attitude to good faith already explained.

Conversely, Administrative Law frequently has recourse to flexible standards – certainly standards far more flexible than the *MeS* test. The most obvious example is the modern approach to *Wednesbury* review, which has already been handled in depth. Also obvious are cases where proportionality review or review for substantive fairness applies – such as the law on legitimate expectations.²¹⁰ But there are plenty of other examples, such as Administrative Law's approach to deciding whether to classify a question as a question of law (in which case the decision is reviewed for correctness) or a question of fact. (in which case, rationality review

²⁰⁹ *MeS* n104, [23]

²¹⁰ *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 (CA) *R v Secretary of State for Education, ex parte Begbie* [2000] 1 WLR 1115 (CA), *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59

applies). Apex courts have insisted that whether any question is a question of law varies based on the context, and will depend on evaluative factors such as the expertise of the initial decisionmaker and whether it is convenient for an appellate court to be obliged to form an independent judgment.²¹¹ Plainly the scope here for evaluation is wide indeed.

To be sure, Administrative Law does have some examples of hard legal rules. A good example is the rule that a representation about how a public body will behave in the future which is made by a civil servant who lacks authority to make that representation cannot give rise to a legitimate expectation.²¹² However, that examples such as this exist does not take away from the main observation that Administrative Law is far more receptive to context-sensitive standards than Contract Law, particularly on the question of what a party must do in order to comply with the law.

This should not be confused with saying that Administrative Law values legal certainty less than Contract Law; just that Administrative Law achieves it in a different way. Although Contract Law holds with the intuitive claim assumed by Bayern²¹³ and adopted by such judicial heavyweights as Antonin Scalia²¹⁴ that rules are more predictable than standards and are thus better at promoting legal certainty, Administrative Law's preference for flexible standards is reconcilable with an approach which suggests that in some circumstances, particularly when regulating complex systems, standards preserve certainty better than rules.

²¹¹ *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44, [2003] 1 WLR 1929, [27], *Jones v First-tier Tribunal* [2013] UKSC 19, [46], citing R Carnwath, "Tribunal Justice: A New Start" [2009] PL 48; see also J Beatson, "The Scope of Judicial Review for Error of Law (1984) 4 OJLS 22, cf *George Mitchell* n206 for Contract Law's approach to a like issue.

²¹¹ *MeS* n104[23]

²¹² *Western Fish Products Ltd v Penwith DC* [1981] 2 All ER 204 (CA), cf Craig, *Administrative Law*, 9th Ed (Sweet and Maxwell 2021), [22-237]

²¹³ *Bayern* n188

²¹⁴ A Scalia, "The Rule of Law as a Law of Rules", (1989) 56 U Chi LR 1175, 1179

Braithwaite argues that the law can actually become less predictable if it holds to a system of rules when dealing with complex matters such as corporate regulation.²¹⁵ The argument here is that, because clear rules, however sound on paper, inevitably have some loopholes that undermine the purpose of the rule itself (tax avoidance being a case in point)²¹⁶ In a similar way, if the administration were governed only by a few rules, without any background standards such as the duty to act reasonably or for proper purposes, one would quickly see the administration finding a way to do what it wants without having to comply with the underlying values a rule is supposed to serve. A rule can thus be self-defeating or result in outcomes no one could have predicted.²¹⁷ Going back to *Wednesbury*, for example, had the court adopted the even more extreme position that the statutory power to give or refuse a cinema license was untrammelled, that would completely destroy any predictability in how the *Wednesbury* Corporation would conduct its decision-making; a strong application for a licence that no one could ever dream of refusing could be refused because the applicant had red hair. That would be far more inimical to legal certainty, and the predictability of agency action, than the adoption of a malleable standard.²¹⁸ It is in this sense that administrative law promotes legal certainty.

Indeed, the ambit of legal certainty is wider in one respect than Contract Law. In addition to the *Wednesbury* example above, legal certainty has been invoked to justify controls on how a Minister can refuse to apply his own policy, as well as how clear a policy is in the first place. In *Mandalia*, the Supreme Court held that a Minister cannot refuse to apply a policy without good

²¹⁵ Braithwaite n191

²¹⁶ Ibid 56

²¹⁷ For a polemic example of a court accepting this reasoning, see *R (Miller) v Prime Minister (No 2)* [2019] UKSC 41, [42-45].

²¹⁸ T Endicott, "Law is Necessarily Vague" (2002) 7 *Legal Theory* 379

reason,²¹⁹ which Green J explained in *Justice for Health* to be a ‘component... of legal certainty’.²²⁰ This was so even though the policies in these cases were not law *stricto sensu*. Even so, Green J clearly thought that a policy – even though not law – fell within the class of norms to which the value of legal certainty applied. It is in this sense that legal certainty has a wider meaning in Administrative Law. But again, legal certainty was not preserved by a clear rule but by a flexible standard. A requirement for a Minister to abide by his own policy absent a good reason still begets judicial evaluation as to whether the reason proffered is good.

Similarly, legal certainty is also one of many justifications for restricting judicial review of tribunal decisions to cases involving important questions of principle or having some other compelling reason justifying further review.²²¹ In this context, the Supreme Court had²²² ruled in *Cart* that a judicial review by the High Court of a decision of the Upper Tribunal to refuse leave to appeal would only be entertained if (1) the case raised an important point of practice or principle, or (2) there was some other compelling reason why the judicial review should be heard.²²³ Both limbs of the test – adopted from the context of second appeals to the Court of Appeal – allow the High Court room for significant evaluation. So clear rules are not nearly as important to Administrative Law’s conception of legal certainty as they are to that of Contract Law. Indeed, these two examples show how a flexible standard is used as part of Administrative Law’s machinery for protecting predictability and legal certainty. In this sense, Administrative Law seems more concerned with protecting predictability of the administrative system generally rather than a narrow focus on clear rules to explain what a Minister must do.

²¹⁹ *Mandalia* n210

²²⁰ *R (Justice for Health) v Secretary of State for Health* [2016] EWHC 2338 (Admin), [141]

²²¹ *R (Cart) v Upper Tribunal* 2011 UKSC 28, cf *R (Privacy International) v IPT* [2019] UKSC 22, [112], see also Judicial Review and Courts Act 2022, s. 2

²²² I use the pluperfect as we have yet to see how the 2022 Act cited above will be interpreted.

²²³ *Cart* n221, [52], Tribunals, Courts and Enforcement Act 2007, s 13

Given that Administrative Law can promote legal certainty using very flexible standards one might assume that Contract Law could do the same thing in the *Braganza* context. Indeed, this seems to underpin Varuhas' dismissal of the argument that the spectre of unpredictability raises any great concerns in Contract Law. But this argument fails to take account of the importance of rational self-interest to Contract Law. Even in the *Braganza* context, the importance of a contractual decision-maker's rational self-interest and the still limited-in-practice role of good faith mean that it is still permissible for a contractual decision-maker to behave selfishly. Once it is accepted that it is not legally wrong for a contractual decision-maker to behave selfishly, the importance of giving the contractual decision-maker clear boundaries as to just how far they can push their self-interest becomes obvious – indeed, that is why Adams and Brownsword link market individualism with clear rules in the first place.

In the Administrative Law cases that use flexible standards to preserve legal certainty and predictability, the emphasis seems to be on certainty for the citizen rather than necessarily giving the decision-maker clear and certain rules to follow.²²⁴ Given Administrative Law accepts that public bodies must act in the *public* interest, as opposed to the personal interests of any given minister, it is reasonable enough to say that clear rules for the administration are unnecessary because those acting in the public interest should not just aim for the bare minimum. In that sense, Braithwaite's argument that clear rules lead to accidental loopholes is valid, because public bodies should not be looking for loopholes. But because a contractual decision-maker can consider private interests, it is more acceptable in principle for the decision-maker to want to know what the bare minimum is, and stick only to that. To do that the need for clarity in the rules and standards used is somewhat greater.

²²⁴JFH n220, [141], *Limbu v Secretary of State for the Home Department* [2008] EWHC 2261 (Admin), [65], R (*Lumba*) v *Secretary of State for the Home Department* [2012] 1 AC 245

c. Practical concerns

There are also two linked practical concerns which enhance the need for the *Wednesbury* test to operate predictably in the contractual sphere, namely (a) limitation, and (b) cases of termination.

(i) Limitation

The limitation period for common-law contractual claims is six years.²²⁵ This would clearly apply to *Braganza* claims.²²⁶ Conversely, the Civil Procedure Rules require non-planning judicial review cases to be brought “promptly, and in any event not later than 3 months” after the grounds for the claim arise.²²⁷ Against that background, the scope for matters to hang in the balance in Administrative Law for an extended period of time is limited; parties are able to rely on a decision being implemented soon after it is made. But because a claim in contract may be brought as of right at any time within six years, parties (including third parties) may be unable to rely on a discretionary decision with certainty during that entire period. That suggests that the test for review should be clear enough that, in the great majority of cases, a party may rely on the decision in deciding what transactions to enter in the future. The suggestion that parties should simply wait until the limitation period expires before acting on the decision is sensible enough when the period is three months, but loses much of its force when the period is six years.

²²⁵ Limitation Act 1980, s. 5

²²⁶ It is arguable that where the relief sought is equitable, as in *Watson*, that the time for suing would be governed by laches. But it is also clear that *Braganza* can be argued at common law, as it indeed was in *Braganza* itself.

²²⁷ CPR 54.5 (1)

(ii) Termination

Termination rights in contract allow a party to sever their obligations with the other party and go back into the market to look for a different counterparty. But if the court finds the termination violated the discretion duties, the initial contract would likely still be on foot.²²⁸ Hence, if a termination right is subject to controls of discretion, neither the decisionmaker nor the third party with whom he now wishes to negotiate a new contract can negotiate safe in the knowledge that the termination decision will not be set aside. Indeed, this provides a further reason in support of Sir David Foxton's submission that the discretion duties should not apply to termination,²²⁹ and the general judicial reluctance in the cases he cites to expand *Braganza* to termination cases. In *Monde Petroleum*,²³⁰ for example, Richard Salter QC rejected a submission that powers of termination were subject to the *Braganza* duties, citing commercial certainty as one of the reasons why, albeit without spelling out this particular factor.

d. Unpredictability in the Case Law

Finally, the concerns about predictability are not solely theoretical, but can be shown in practice. I have already referred to cases such as *Paragon* and *PAG* as demonstrating that, in the commercial context, review is typically light touch. However, other cases have taken a more interventionist line even in the commercial context. *Watson* and *BHL* are both examples of these. In both of these cases, as earlier noted, Judge Waksman impugned the reasoning process that led to the decision. But in doing so, he decided on a far narrower ambit of discretion than that which existed in *PAG*. In *BHL*, Leumi were allowed to charge additional collection fees up to

²²⁸ *Societe Generale v Geys* [2012] UKSC 63

²²⁹ D Foxton, "A Good Faith Goodbye" available at <https://bit.ly/3PjtdWD> (accessed 1 September 2023)

²³⁰ *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm), [274], see also *Monk v Largo Foods Ltd* [2016] EWHC 1837 (Comm), *TSG Building Services Plc v South Anglia Housing Plc* [2013] EWHC 1151 (TCC), cf *Timeload Ltd v British Telecommunications plc* [1995] EMLR 459

15% of the amount collected. Judge Waksman held that the discretion, although wide-ranging on its face, was limited to making an estimate of the costs that *Leumi* were likely to incur in the collection exercise. On the facts, Leumi could not rationally have estimated that their costs would ever exceed 4%. And in *Watson*, Judge Waksman held that the power to veto the exercise of the of the share purchase option was limited to deciding whether the option holders had made sufficient contributions to have earned the right to a share. The discretion in *Watson* was therefore backwards-looking and the Watchfinder board of directors were not entitled to consider likely future contributions in the exercise. It is worth pointing out that in neither case did the contract explicitly limit the discretion in this way. This approach carries with it real risks that the court will conclude that the discretion was limited in a way neither party intended.

In a similar vein, in *Equitas*, the Court of Appeal held that insurers were bound to present their claims to reinsurers pro-rata, even if one or more of the re-insurers was insolvent. Had the approach in *PAG* been followed, it is reasonable to assume that the insurers would have been able to present their claims in whatever way was best connected to their self-interest, and defend the rationality of their decisions by sole reference to that self-interest. However, in the special context of the post-*Fairchild* landscape, the Court of Appeal's limitation of the discretion meant, that, in practice, there was only one way in which the discretion could be exercised by the insurers. To be fair, Males LJ made clear that this solution was being adopted in order to deal with the unintended consequences of *Fairchild*.²³¹ However, the way in which the discretion in *Equitas* was limited means that the Court's approach is closer to looking at the reasonableness of the insurer's actions rather than its rationality, which is not what was sanctioned in *Braganza*. I suggest that *Equitas* was a Holmesian hard case in which the limits on rationality review were implausibly stretched.

²³¹ Ibid [116]

B. Implications for *Braganza*

Given the above concerns, there is good reason to think that Contract Law's approach to rationality review must operate with less flexibility than the *Wednesbury* standard. This does not mean contract law cannot use a standard, but it does mean the amount of flexibility in the standard used ought to be less. The *M&S* test for an implied term is an example of a Contract Law standard (as opposed to a rule) which still preserves clarity, because the bars of necessity and obvious are clear and the bar for a term to be implied is high. In a similar vein I agree with Lim and Chan that using the traditional *Wednesbury* standard with a few clearly defined situations in which intensity may vary would preserve predictability.

1. Certainty in Contract Law Does Not Justify Overruling *Braganza*

As earlier mentioned, Bayern correctly identifies standards as being less conducive to legal certainty than rules. Given that this intuitive approach is more consistent with contract law's approach to how parties should behave than Braithwaite's contrary suggestion (which works better in Administrative Law), one could object to *any* use of a *rationality* test in Contract Law. The court would, on this view, have no power to interfere at all, no matter how lacking in logic the exercise of discretion was. In a case like *Braganza*, this would mean that so long as the Supreme Court accepted that BP's team genuinely believed that Mr Braganza killed himself (which BP did), Court would have been unable to interfere.

Morgan advanced this rather strong version of *Wednesbury*-scepticism in Contract before *Braganza* was decided.²³² He suggested that having a jurisdiction to challenge exercises of contractual discretion for irrationality would on its own be enough to undermine stability in commercial law, even if the jurisdiction was sparingly exercised and the threshold for review was as high as Lord Greene MR in *Wednesbury* said it was. This particularly strong argument is wrong, at least insofar as it concerns “old” *Wednesbury* review (ie as Lord Greene initially formulated it).

It is true that the *Wednesbury* formulation, even as initially expressed by Lord Greene, does involve some evaluation (eg was a particular consideration “relevant”, and was the decision “so unreasonable...”). However, the example given by him of the teacher being fired because of her red hair sufficiently brings home how difficult it should be to prove irrationality, such that parties should be able to predict with reasonable accuracy what a court reviewing a discretion under the traditional formulation will regard as off-limits. Irrationality of the “red hair” variety has an “I know it when I see it”²³³ character to it which is easy enough to predict. Like the *M&S* test, light touch *Wednesbury* review does not involve so much judicial evaluation that commercial certainty is significantly imperilled. If the line in *Paragon* and *PAG* is usually taken parties should not need to worry about being held in breach of contract for rationally preserving their interests to those of other parties.

And more crucially, failing to allow even light-touch review could frustrate contracting parties’ intentions and predictions even more. Take a case like *Paragon* which was discussed in Chapter I. The bank in that case exercised a discretion in the mortgage contract to increase interest rates because it was in dire financial straits. If, instead of adjusting rates because they

²³² J Morgan, “Against Judicial Review of Contractual Discretions” [2008] LMCLQ 230

²³³ *Jacobellis v Ohio* (1964) 378 US 184, 197.

were in dire financial straits, Paragon had increased the mortgage rates of all houses with interior walls that had been painted pink, because that was its CEO's least favourite colour, such an exercise of the discretion conferred would never have been contemplated by any of Paragon's customers. If the court refused to intervene in such a situation, this would pose a far greater obstacle to the goal of protecting people's ability to plan their lives around a stable set of rules than anything that light touch review would pose. If review were unavailable in such an extreme case, contract law would no longer "fulfil the reasonable expectations of honest men";²³⁴ it would subvert them. A key point earlier made is that legal certainty is there for a purpose; that purpose would be damaged, not enhanced, by refusing any review of contractual discretion, as Morgan suggests. In cases such as *Paragon*, where the ordinary test for implying a term to the effect that the decision should not be irrational is met, it would damage the predictability of the law to deny the implication of such a term. To that very limited extent, there is a place for Braithwaite's approach to certainty in Contract Law. So long as the court in a strong-discretion case carefully considers whether a term can be implied under *McS*, this is far preferable to refusing outright to accept that any contractual powers are subject to *Wednesbury* controls, even where such is consistent with parties' intentions. Hence Morgan's criticism is over-expansive in failing to recognise that where the *McS* test for implying a *Braganza* term to control strong discretion is met (as it was in *Paragon*), to fail to apply the *Braganza* controls would be disruptive to the parties' expectations.

2. However, Certainty Does Justify Fewer Variations in Intensity of Review

But Morgan's criticism, based on vagueness and lack of certainty, becomes a lot more powerful when he raises the spectre of contextually varying *Wednesbury* review (i.e. Saini J in

²³⁴ Lord Steyn, Contract Law: fulfilling the reasonable expectations of honest men (1997) 113 LQR 434.

Wells); not to mention the prospect that, if *Wednesbury* were replaced by proportionality in administrative law, it would be hard for contract law to resist the same thing happening there, such that contractual discretion would be reviewed for proportionality or substantive fairness, the latter of which has been used even outside human rights cases.²³⁵ He refers here to the “expansion and flux” of administrative law, which would (he says) be bad news for contract law.²³⁶ Certainly the point that, whatever happens in administrative law, proportionality review of contractual discretion would involve an illegitimate (and potentially unstructured) interference by the courts into the terms agreed by the parties is well-taken. The further one goes beyond the sort of clear cases mentioned above (regarding red hair and pink walls) the harder it becomes to square judicial intervention in contractual relations with protecting the parties’ intentions, expectations, or tacit assumptions.

a. Variable intensity?

Insofar as Morgan argues against the use of **contextual** *Wednesbury* in contract law, he also has a point unless the categories of cases in which a court may depart from “red hair review”, and the way in which the test is modified, are sufficiently clear. Varuhas suggests a few candidates. Two of them should be rejected, namely (i) “relational” contracts, and (ii) cases where the court considers it has stronger institutional competence.²³⁷ I deal with these in turn.

(i) Commercial versus relational contracts

Varuhas suggests that intensity of review should vary depending on whether contracts are commercial or relational. A relational contract is one which involves a significant degree of

²³⁵ *Coughlan* n210

²³⁶ Morgan n232

²³⁷ Varuhas n128, p.10

cooperation between the parties importing duties of trust and confidence. The best example of this is employment contracts, of which *Braganza* was of course exemplary. By contrast, most commercial contracts act on a Darwinian model; each party is allowed to look after its own interests and there is no relationship beyond the purely transactional. Most goods and services contracts fall into this category.²³⁸

Although I concede that the nature of the relationship is likely to be relevant to whether review lies at all, its relevance to intensity of review is dubious. Given that – as explained above – the test for implication of the *Braganza* duty into strong discretions is whether such a duty is necessary to give business efficacy to the contract or is otherwise so obvious as to go without saying – *M&S* – it is not difficult to see that the nature of the two parties’ relationship will affect whether control of discretion is necessary to give effect to that relationship, or whether such control goes without saying. In a Darwinian commercial relationship, it will often be unnecessary that discretion be controlled in order to make the entirely transactional relationship work. But it is easy to see that a contract that requires two parties to cooperate cannot work without a prohibition on irrational decision-making. However, that point does not translate into saying that, once review is available, its intensity should vary based on the nature of the relationship.

Indeed, the argument that the standard of review should be more intensive for relational contracts is problematic. Varuhas cites Lord Hodge in *Braganza* as authority for the proposition that relational contracts justify greater scrutiny. However, these remarks, with respect, lacked the support of a majority. Lady Hale’s judgment is the bellwether. Although she also does refer to

²³⁸ In the *Braganza* context, *Paragon*, *Lufthansa*, and *Product Star* all are clear examples.

the employment relationship as one thing that justifies the *availability* of review, she does not heighten the scrutiny involved in her review of BP's fact finding as a result. Indeed, quite the opposite:

“There is no reason why the employer should not approach that decision in the same way that any other decision-maker should do.”²³⁹

True, this statement goes to what the employer should do, not the court; but if the sentiment here is that employers should do the same thing as anyone else making an important decision, it is hard to see how courts can hold them to different standards than anyone else.

Second, more intensive review of relational contracts seems out of step with *Faieta v ICAP*,²⁴⁰ where a challenge to an employer's decision to put an employee on garden leave for some fifteen months – preventing him from working and earning a bonus as well as from working elsewhere – was unsuccessful. In that case Moulder J approved the employee's concession that the Court was not entitled to engage in “intensive scrutiny” of the employer's actions.²⁴¹ She did accept that the employer was required to give reasons, but that does not mean the review itself was any more intense (although of course, the giving of reasons would add to the evidence base for the Court).

Finally, and crucially, given the predictability issues discussed above, it is hard to formulate the test for employment situations in a way that is different from red-hair review. In other words,

²³⁹ *Braganza* n8, [36]

²⁴⁰ *Faieta v ICAP* [2017] EWHC 2995 (QB)

²⁴¹ *Ibid* [44]

once a court accepts Varuhas' suggestion that the employment context (for example) justifies a 'more nuanced',²⁴² and therefore modified, approach, it needs to explain, with precision, how the test as modified is different. And it needs to say what the yardstick for substantive review is, if it is not to be the 'so unreasonable...' formulation of Lord Greene MR. So, even if the employment context justifies more searching review, one would have to explain how precisely it would be more searching, which Varuhas does not. At the very least one would need to formulate a headline test that clearly marked the departure from red hair review.

(ii) Institutional Competence

Varuhas also suggests that the intensity of review may vary depending on the institutional competence of the court compared with that of the contractual decision-maker.²⁴³ Such is a well-established position in administrative law, but again its transposition to contract law poses serious problems.

First, institutional competence could mean one of two things. It could mean the legitimacy of the source of the decision maker and court's respective powers, or it could mean their respective expertise to decide the question. Varuhas seems to deal with both meanings under the umbrella of competence, but the two factors are really quite distinct.

As to the first meaning – that of legitimacy – the only area where this is likely to vary is in the context of political parties with elected committees, on which there is already substantial case law.²⁴⁴ It is clear that courts are reluctant to interfere on rationality grounds with such decisions.

²⁴² *Wells* n48, 32

²⁴³ *Ibid*

²⁴⁴ *Williamson v Formby* [2019] EWHC 2639 (QB), *Rothery v Evans* [2021] EWHC 577 (QB)

Even so, it is unclear that the scrutiny here is any less in practice than in the commercial context (eg *PAG* and *Paragon*). If, as I have suggested, red-hair rationality should be the baseline, it is difficult to see how one could make review for rationality any more deferential than that without simply getting rid of rationality review altogether. As we know from *TAQA*, this is of course an option, but in the context of the way the party Rule Books are drafted (as explained in *Rothery*) it is distinctly unlikely that this would accord with the intentions of the members of a party or its Committee.²⁴⁵ But again, given the legitimacy of the elected NEC, review must be limited. So, we are back where we started with light touch, red-hair review. In the context of political parties and commercial concerns alike, light touch review is the least bad option available, albeit for the different reasons just explained.

As to the second meaning, Varuhas suggests that courts may have more competence – and thus should review more intensely - where they can hear witnesses and the judgment in question does not involve expertise. Many of the discretions that might be subject to high-intensity review under this head will be fact-finding discretions and I posit a different rationale for a more high-intensity review in this case in part C below. But this particular justification for high intensity review – ability to hear evidence, even live witnesses – cannot work.

Part of the reason why a contract is likely to include a fact-finding power in the first place – particularly a power to decide a fact – is to avoid a full High Court trial of disputed facts. This is something such powers have in common with arbitration clauses, and, in administrative law, provisions sending cases to tribunals rather than courts. But saying that courts could review

²⁴⁵ For instance in *Rothery*, the discretion allowed Labour's NEC to force a candidate on a local constituency party, and circumvent the detailed process for a constituency to nominate its own candidate. It is inconceivable that anyone could imagine that this power was immune from all challenge; if so, the constituency selection process was a dead letter.

more intensely by hearing witnesses defeats the whole purpose of the fact-finding power, namely, to keep factual disputes as far away from court as possible.

And even if these arguments against Varuhas' suggestion of variable-intensity *Wednesbury* review are unsuccessful, one is still left with the uncertainty point above. Varuhas is no clearer about how the scrutiny changes in this instance – how precisely the *Wednesbury* test changes beyond saying it is more intense – than he is about how it should change in the relational contract sphere. Again, this is not a problem in Administrative Law, but it is in Contract Law.

(iii) Caveat

None of this is to suggest that variable intensity review in *Braganza* is doomed to the dustbin, but it does require substantially more thinking through than saying that review is contextual, or that intensity varies. However, the Courts need to be clearer about the circumstances that justify varying intensity review or a more limited discretion than the contract, on the face of it, requires.

Lim and Chan²⁴⁶ suggest that the basic test should be the *Wednesbury* test, as initially formulated by Lord Greene, but that certain clearly defined categories of case may justify a departure from that basic test. Such an approach ought to work so long as the appellate courts are (i) clear about the boundaries of the 'departing categories', and (ii) formulate a clear alternative test to govern those categories. Lim and Chan suggest that there needs to be a balance

²⁴⁶ Lim and Chan, Problems with *Wednesbury* Unreasonableness in Contract Law, (2019) 135 LQR 88, 113 (Lim)

between certainty and justice in this area, and this is the best way to achieve it.²⁴⁷ To that end I now set out two sets of circumstances where the basic *Wednesbury* formulation can be changed in *Braganza* cases without disrupting the overall certainty of Contract Law.

C. Discretion for a particular purpose

Earlier I suggested that the case law hints that it is easier to challenge the exercise of a contractual discretion where it appears to have been created to achieve a specific purpose. It is unlikely that *Braganza* can fit comfortably into this category. With a degree of refining this can be an area that justifies a court giving additional scrutiny designed to make sure the contractual decision-maker keeps to that specific purpose.

It is worth observing that it is part of most formulations of the *Braganza* duty that the discretion must not be exercised for an improper purpose, in addition to the requirement that the decision be rational.²⁴⁸ However, there is a distinction between saying that discretion may not be exercised for an improper purpose, and saying, of a particular discretion, that it may only be exercised for one purpose alone. In *PAG*, the discretion did not have to be exercised for any particular purpose, however it was still held obiter that the use of the discretion to deliberately vex and harass the claimant into giving up valuable contractual rights would be improper. In this first sense of improper purpose, there is an extremely blurred line between irrelevant consideration, substantive irrationality, and improper purpose – in *PAG*, for example, using the

²⁴⁷ Ibid

²⁴⁸ *Product Star* n17

power to order valuations in order to vex or harass was treated obiter as an example of substantive irrationality even though it seems more like improper purpose. This is unsurprising given Administrative Law also finds the lines blurred in this area.²⁴⁹

There is, however, a separate class of contractual discretion exemplified by *Gan* where the discretion may only be used for **one specific purpose** (in *Gan*, protecting the reinsurer from unfounded claims by the initial insured), and the use of the discretion for any other purpose is off-limits. It is the *Gan* type of case – where there is only one purpose for which the discretion may be used – that I am discussing here. I call this a ‘specific purpose case’. To be clear, improper purpose is still available as a ground of challenge in non-specific purpose cases where the purpose is clearly improper by any metric (eg to irritate the other party into submission – *PAG*), but contextually heightened *Wednesbury* review is only appropriate in specific purpose cases such as *Gan*.

Extra-judicially, Lord Sales argues that improper purpose should be the main category of reviewable contractual discretion.²⁵⁰ He is critical of the use of *Wednesbury* as the appropriate transplant. Instead, he suggests that, if any public law analogy is apposite, it is *Padfield v Minister of Agriculture*.²⁵¹ This case in administrative law allows a court to quash a decision taken under statutory powers if the decision maker has used the power ‘so as to frustrate the policy and objects’ of the legislation.²⁵²

²⁴⁹ Craig, [19-011]

²⁵⁰ Sales n178

²⁵¹ *Padfield v Minister for Agriculture* [1968] AC 997 (HL)

²⁵² *Ibid* 1032-33

In the days before deregulation, the Milk Marketing Board was set up by the Agricultural Marketing Act 1958 to purchase milk from suppliers at rates which the Board set. The Act gave the Minister a discretion to submit those prices for review by a Consumer Committee, whose recommendations would be public, and which would then have to be considered by the Minister when deciding whether to change the Board's prices. The milk producers in the Southeast had pushed for the Board to increase prices on milk from their region, and, when the Board refused, they asked the Minister to send the case to the Committee. The Minister refused because he was worried that if the Committee recommended an increase, he would feel compelled to follow that recommendation. Basically, the Minister refused to ask the Committee because he did not want to know their answer. The House of Lords quashed this decision, because the whole point of the Act was that there should be a public report by the Committee that the Minister was bound to consider. By pre-empting this in refusing to refer the matter, the Minister was trying to defeat the legislative policy and acted against the purpose of the discretion to refer.

Lord Sales argues that this is a far better analogy for contract law (and indeed private law discretion more widely) than the *Wednesbury* decision, and ought to replace it as the transplant.²⁵³ I have already explained why some rationality review is appropriate to a contractual discretion, and nothing needs to be added to that. However, there are two further concerns about transplanting *Padfield*. These two concerns do not mean a line of cases with some resemblance to *Padfield* should not develop in Contract Law, however, they do mean that an approach based on improper purpose must be bespoke to the structure of Contract Law rather than a wholesale transplant of *Padfield* and the cases, doctrines, and theoretical perspectives from Administrative Law. *Padfield* would therefore be a useful starting point in legal thought, but nothing more.

²⁵³ *Lymington Marina Ltd v McNamara* [2007] EWCA Civ 151

The first of the two concerns is that the rubric in which courts routinely would seek to figure out the specific purpose of a particular contractual discretion (or the contract as a whole) might be far more damaging to the legal certainty concerns already expressed than an appropriately disciplined version of *Wednesbury* review.²⁵⁴ Again, *Paragon* is a good example; it is not clear what ‘policy’ or ‘objects’ the power to increase mortgage rates contemplated. Better examples still are contracts with wide termination clauses (eg clauses allowing termination other than for breach).²⁵⁵

The point is also evident from *Watson*, where we have seen that Judge Waksman considers what the “target” of the discretion was, and concluded it was to determine whether the option holders had done enough to earn the right to a share. It is unclear that Judge Waksman was correct that this really was the specific purpose (or ‘target’, per Judge Waksman) of the discretion, given that the contract contained no such limitation. I suspect Judge Waksman’s conclusion here caught the board off-guard. *Watson* is a warning, unbridled judicial power to decide what the purpose of a contract could be just as unpredictable as contextually varying *Wednesbury*.

My second concern is that there is a lively debate about the theoretical underpinning of improper purpose review in Administrative Law, and adopting improper purpose review in Contract Law with all Administrative Law’s theoretical baggage on the subject would be unhelpful. In Administrative Law there remains a debate about whether review for improper

²⁵⁴ Cf *Sales*, n178, 396

²⁵⁵ *Timeload* n161

purpose under *Padfield* is best understood as part of the *Wednesbury* framework for review of discretion, or as a logical extension to the interpretation of the statute which is more closely linked to review for error of law.²⁵⁶ The general assumption is that if improper purpose fits under ‘illegality’, the court reviews the agency’s (in Administrative Law) assessment of the statute’s purpose for correctness, whereas if improper purpose is a species of irrelevant consideration, and therefore irrationality, the court would defer to the agency’s assessment of purpose.²⁵⁷ Moreover, as Craig says, any consideration of the purpose of a discretion in Administrative Law requires judgments of social and administrative policy to be made; improper purpose in Administrative Law is not a self-executing doctrine.²⁵⁸ Such an approach, if transplanted into Contract Law, would be out of step with the more textual approach to interpretation espoused in *Arnold v Britton*,²⁵⁹ and the clear line drawn between interpretation and implication in *Me’S*. There is a far more satisfactory theoretical basis in contract law’s own existing structure for improper purpose claims, namely, by considering whether the proposed specific purpose of the discretion can be said to form part of the implied term.

We have already seen the doctrine of implied terms at work throughout *Braganza*. In the bespoke approach to contouring review for improper purpose in contractual discretion a court should only hold that a strong discretion (ie a discretion to decide what to do) is exercisable only for a specific purpose (or ‘policy’ or ‘object’ to use Lord Reid’s words in *Padfield*) if the specific purpose in question meets the test for implication of a term in fact (i.e. be so obvious as to go

²⁵⁶ H Wilberg, “Deference on Relevance and Purpose? Wrestling with the Law/Discretion Divide” in H Wilberg and M Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart Publishing 2015), 263ff generally; especially 267.

²⁵⁷ *Ibid*, 267

²⁵⁸ *Ibid*

²⁵⁹ *Arnold* n88

without saying). Such would preserve legal certainty whilst allowing for the purposes of contracts and discretions within them to be recognised when sufficiently obvious. Only once a purpose to a discretion can be implied should the court consider that purpose in shaping the contours of review.

I therefore suggest the following three-step analysis where it is sought to step up the intensity of rationality review because the discretion may only be exercised for a specific purpose.

Step One: Can the Specific Purpose be Implied?

The first step in specific purpose cases is surely working out whether the discretion really is one that is only in the contract to achieve a specific purpose, or whether the contractual decision-maker is entitled to exercise the power for any purpose (and, most likely, his own interests). Of course, if the contract states a specific purpose for the discretion, one can skip this step. Otherwise, a one must ask whether the suggested specific purpose of the discretion is one that may be implied into the contract in the normal way. The leading modern authority is *M&S*.²⁶⁰ In that case Lord Neuberger reemphasises that the test for implication of a term in a contract which the parties have not included is a high one: the term must be reasonable; it must be necessary to give business efficacy to the contract or be so obvious as to go without saying;²⁶¹ the term must be capable of clear expression; and it must not contradict any express term. Applying that to this area of the law, I suggest that for a contractual discretion to be tied to a particular purpose, the purpose must be:

1. Reasonable;

²⁶⁰ M&S n104

²⁶¹ Lord Neuberger clearly accepts these are alternatives, so in the *Braganza* context if it is obvious that the discretion was to be exercised for a specific purpose then it need not also be shown that the limitation to that purpose is necessary: [2015] UKSC 72, [21].

2. **Either** necessary or obvious (or both);
3. Capable of clear expression; and
4. Not contradicted by an express statement in the contract that the discretion can be used for any reason.

Gan Insurance was earlier cited as a case where the discretion appears to have been geared to a particular purpose. It clearly would have met the criteria above. Recall that the case involved a clause between a first insurer and the reinsurer which said that the first insurer was not to pay out any claims without first getting the reinsurer's permission. I suggested that the specific purpose of this provision (and the discretion of the reinsurer to give or refuse permission) was to prevent the reinsurer from having to pay out claims that the first insurer should push back on (eg because the claim is exaggerated or unfounded). Such a purpose is clearly reasonable. Assuming it is not necessary, it is clearly the obvious specific purpose behind the clause because it is difficult to see why else the reinsurer should be interested in whether the insurer fights a claim or not. Finally, the purpose is capable of being clearly stated and nothing in the contract suggested the clause was to be used for any other reason. So, *Gan Insurance* is a case where the discretion clause was said to have a particular purpose, and which clearly meets the implication test.

Conversely, because it is unclear why the discretion in *Watson* **necessarily or obviously** had to be exercised for the specific purpose (or 'target', to use Judge Waksman's word) of ascertaining whether the claimants had contributed enough to deserve a share, the discretion in that case would be unbounded. On that approach, Judge Waksman should have held that the discretion in *Watson* had to be exercised rationally, but, as in *PAG*, could be exercised in rational, commercial self-interest. Similarly, in *Equitas*, it is difficult to see why the insurers, even though honest and reasonable people, would have agreed to the proportionality principle had it been suggested by an officious bystander. It follows that, under the stricter approach to purpose

suggested here, *Equitas* was wrongly decided.²⁶² The Supreme Court granted leave to appeal in *Equitas* but the case settled shortly before the hearing.²⁶³

There are two reasons why a proposed specific purpose should have to meet the ordinary implication requirement explained above. First, it is consistent with current doctrine for implication of terms into a contract (including discretions) and the interpretation of contractual provisions (again including discretions) to be seen as somewhat distinct exercises.²⁶⁴ Unless the contract actually says what the specific purpose is the court will be reading words into the contract in order to ascertain it, which is a form of implication. Second, it fits best with the predictability-related concerns set out above that a discretion which seems untrammelled should only be confined to a particular purpose by implication when that purpose is obvious. Where there is room for doubt, and/or many plausible purposes, the court should not try and speculate. To do so would risk undermining the expectations of the parties by getting it wrong – as I suspect happened in *Watson*. There, Judge Waksman accepted he was filling a ‘void’.²⁶⁵ But to risk stating the obvious, the law on implied terms cannot be used to fill voids unless the test for an implied term is met.

Step Two: The defendant’s reasoning process

²⁶² As to *Watson*, the judge there also held that there was no genuine exercise of the discretion. Assuming, therefore, that this criticism stands apart from the “target” of the discretion the result in *Watson* can still be supported on my analysis, but not the “target” aspect of his reasoning at [113]

²⁶³ Beighton et al, *Case Preview: Equitas Insurance Ltd v Municipal Mutual Insurance Ltd*, available at <https://bit.ly/3PhOSHP> (accessed 1 September 2023)

²⁶⁴ *McS* n104, [25]-[28]

²⁶⁵ *Watson* n174, [115]

If the discretion is one that may be exercised only for a particular purpose in the sense just explained (as in *Gan* but not in PAG) a court must review (as under ordinary *Wednesbury*) the defendant's reasoning process. Given the discretion is limited in this case to achieving a particular purpose, it would make sense that the two questions normally asked at this stage of the *Wednesbury* inquiry (namely, 'did the decisionmaker take everything relevant into account', and 'did he exclude everything irrelevant from account') would change to the following:

1. Did the decisionmaker consider everything that is **relevant to the purpose of the discretion?**, and
2. Did the decisionmaker exclude from consideration everything that was **irrelevant to the purpose of the discretion?**

If these two questions are answered yes, then the decision would stand unless the **outcome** of the decision could be impugned for irrationality. Taking *Gan Insurance* again, the issues which would be relevant to deciding whether to grant permission to pay out the claim would be the strength of the evidence supporting the claim, and whether given any gaps in the evidence a lower settlement might be accepted. But the reinsurer would be able to form their own view of the evidence, just as Mance LJ accepted in *Gan*. Similarly, as Arden LJ explained in *Lymington Marina*²⁶⁶, where the purpose of the discretion was to ascertain the suitability of the sub-licensee of a Marina (rather than to allow the Marina to consider the commercial viability of the proposed sublicensee as a whole), the Marina would be allowed to consider whether the proposed sublicensee had been late paying mooring fees elsewhere, but would not be allowed to consider whether the proposed sub-licensee had ever lived outside the UK, since such has no relevance to his suitability.²⁶⁷

²⁶⁶ *Lymington* n253

²⁶⁷ *Ibid*, [28]

Step Three: Outcome

Assuming a judge in a particular purpose case found that the decision-maker had kept to the matters that were relevant in light of the purpose, she would then have to look at the outcome to decide whether it was rational (just as under ordinary *Wednesbury*). But again, here the test would be somewhat different: the decision should be one a rational person **acting to achieve the purpose of the discretion** could have made. Again, going back to *Gan* a judge would then look at the initial claim made against the first insurer by the end insured, and would be able to interfere if the strength of the claim to the original insurer was so overwhelming that nothing would be gained by the reinsurer withholding permission and engaging in litigation. In such a case one could not say that a rational reinsurer could possibly decide to withhold permission to the first insurer to pay out the claim. But although the modification of the *Wednesbury* test may make it easier to establish irrationality here, the test still remains difficult to surpass. As with ordinary *Wednesbury* irrationality I suspect that the modified ‘process’ limbs of the test would still do more work in specific purpose cases than the ‘outcome’ limb.

D. Weak discretion

Earlier, we saw that weak discretion is currently more readily held to be subject to the *Braganza* control (and it was postulated that this control arises for weak discretion by implication of law) and that it is easier to challenge the exercise of this type of discretion than to challenge strong discretions.

Firstly, as explained above as a policy reason for the implied-in-law approach to factual questions, a contractual decisionmaker deciding a factual question as in *Braganza* to some extent

steps into the shoes of the court. It was earlier suggested that implication in law is justified to prevent the court's ordinary role in contractual cases as a factfinder being totally ousted (even though the court's power in *Braganza* claims is far less than its power to act as the primary finder of facts in the ordinary run of cases not subject to an arbitration agreement or a weak discretion). By extension, there is also a strong policy argument that the courts should be able to ensure that they have appropriate scrutiny of the fact-finding procedure and reasoning process. As we will see this justifies Lord Neuberger's suggested analogy in *Braganza* in which he sought to compare the function of a reviewing court in *Braganza* to that of an ordinary appellate court in civil litigation.

Linked to this point, I repeat the conclusion in Part I that controls on weak discretions arise in law rather than in fact, and therefore are not derived from the presumed intentions of the parties. With controls on **strong** discretions which arise by implication in fact -and thus depend on party intention - one objection to variable intensity review is that it is difficult to reconcile the full nuance of variable intensity review with the presumed intentions of the parties. One ends up pushing a square peg into a round hole. But, in the case of control over **weak** discretion, which arises by operation of law without reliance on the intentions of the parties, this objection never arises, because one does not need to reconcile variable intensity of review with what the parties likely intended. Rather, if variable intensity review of weak discretion is justified by policy and fairness concerns, express words would be needed to exclude such review, if it can be excluded at all.

This point suggests that a nuanced approach to review is justified in respect of weak discretions, and that this represents a pocket of cases in which an approach to review that more closely resembles the principles of administrative and appellate law should continue to develop. The court would then consider, as in administrative law, its own institutional competence, and

whether the decision maker has relevant expertise in deciding the question the weak discretion asks (ie did Mr Braganza kill himself). In cases where the court is reviewing a fairly binary black or white question – as in *Braganza*, where either Mr Braganza killed himself or he did not – this will likely lead to more intense scrutiny, but where, as in *Brogden* (pre *Braganza*), the contractual decisionmaker was called to make a specialised, multifaceted evaluation (in that case, the economic value added by the employee), the expertise of the decision-maker, the highly specialised nature of the issue, and the highly subjective nature of the assessment would justify a more deferential approach closer to traditional *Wednesbury*.

A more intense review of fact-finding is already consistent with *Braganza* itself and the court there insisting on ‘cogent evidence’ before a suicide finding could be made. As already mentioned, it is hard to see BP’s decision in *Braganza* being successfully challenged if the test is the non-heightened version of *Wednesbury*, even if that is the version of the test Lady Hale quotes.

Finally, the main general objection to variable intensity review has no application to weak discretions. In Part A of this Chapter, I referred to the continued importance of self-interest to contract law, and the limited role played by good faith even in the *Braganza* context, evidenced by *PAG*. However, where the power is to find or assess a fact, the self-interest of the decisionmaker is plainly an irrelevant consideration which a decisionmaker cannot consider. In a case like *PAG*, a decisionmaker’s discretion (‘Party X may do Y’) allows the decision-maker to take account of his own interests. But the question before BP’s team in *Braganza* was quite different; it was whether Mr Braganza killed himself or not. The fact that BP’s self-interest in the future would favour a finding of suicide was simply irrelevant to whether Mr Braganza killed himself in the past. If BP found that Mr Braganza killed himself because that would mean BP did not have to pay a death benefit, that would plainly involve taking an irrelevant matter into account (and

probably acting for an improper purpose, too). Hence, the need to find a balance between clear rules within which parties may pursue their self-interest and the need to control abuse of power – of obvious importance to strong discretions – hardly arises for weak discretions.

Given these arguments, where weak discretion is involved, a due deference approach to *Wednesbury* review would be appropriate.²⁶⁸ However, as explained earlier, the court should still conduct this review without hearing oral evidence (or indeed accepting evidence that was not before the initial decision-maker) or trying to conduct a full trial, because a discretion clause is probably there precisely to avoid a full trial with witnesses on oath.

If the due-deference approach is adopted to fact-finding powers, the court's review of a factual finding would look something like how appellate courts review findings of fact under the Civil Procedure Rules,²⁶⁹ a point mentioned by Lord Neuberger in *Braganza*.²⁷⁰ A court would here afford more deference to decision-makers with appropriate expertise, as was the case in *Braganza* but not in *Acorn*. But crucially, the court would have greater scope to direct factfinders to look for strong evidence before finding that an inherently unlikely event happened (such as requiring 'cogent evidence' to justify a finding of suicide [*Braganza*] or fraud [*Acorn*]). As already emphasised, it is unlikely that imposing such requirements would have been possible on a strict reading of Lord Greene's test in *Wednesbury*; failing to demand cogent evidence of suicide is nowhere near sacking a teacher for having red hair in terms of degree of irrationality.

²⁶⁸ It is true that in some Administrative Law cases where an objective fact is in question, the court reviews the finding of fact made by the agency for correctness, not reasonableness, when the objective fact is a condition precedent to the agency's powers. See *R(A) v London Borough of Croydon* [2009] UKSC 8. But in that case, the statute did not give the agency power to decide who was a child or not, see *Croydon*, [1]. In *Braganza* cases, as we've seen, the contractual clause is framed "if the decisionmaker believes X", and, in *Braganza* specifically, "if the company believes the death was caused by the employee's wilful act". The fact that, unlike in Administrative Law "precedent fact" cases such as *Croydon*, the Company in *Braganza* is given power to decide the facts necessarily means the court should review with due deference, not for correctness.

²⁶⁹ CPR 52.21(1-3)

²⁷⁰ *Braganza* n8 [105]

Seizing on Lord Neuberger’s ‘appellate court’ analogy, there should still be a process stage and an outcome stage (as there was in *Braganza* itself). Indeed, at the “process” stage, there will also be significant scope for the court to provide guidance on how the decision-maker should go about investigating the matter.²⁷¹ Although the court would bear in mind that, as Mocatta J pointed out in *The Vainqueur José*,²⁷² the expectations on a contractual decisionmaker should be less than on a court, this would also allow the court to impose some minimal standards of procedural fairness in relation to fact-finding, too – as Popplewell J did in *Dymoke*.²⁷³

The substantive stage of the court’s review would then look to whether the decision ‘exceed[s] the generous ambit within which reasonable disagreement is possible’.²⁷⁴ This would ensure that the contractual decisionmaker’s primary fact-finding role is respected whilst still ensuring that the courts can interfere to correct glaring factual errors. For instance, if in a future case a decisionmaker does direct themselves correctly that cogent evidence is needed before suicide or fraud can be found, the courts could intervene if the decisionmaker unreasonably concluded that cogent evidence existed. As with appellate review, the extent of the deference afforded the initial decisionmaker might vary depending on whether the decisionmaker had the advantage of hearing from witnesses directly, and, perhaps more pertinently in this field, the decisionmaker’s expertise.

²⁷¹ *Education Secretary v Tameside BC* [1977] AC 1014 (HL)

²⁷² *Vainqueur* n23, 577

²⁷³ *Dymoke v Association for Dance Movement Therapy UK Ltd* [2019] EWHC 94 (QB)

²⁷⁴ *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 1 WLR 577, [197] Ward LJ

It may be objected that this approach could lead to uncertainty and unpredictability, but it would be no more uncertain than where an appellate court reviews the judgment of a lower court on a question of primary fact (with which review of weak discretion is analogous - see above), and appellate courts in contract cases have applied a contextually varying approach to review of trial court primary factfinding for several decades or longer.²⁷⁵

E. Conclusions

This chapter has argued that the scope for the standard of review to vary in Contract Law under *Braganza* should be far less than in Administrative Law. Nevertheless, two exceptions have been suggested: first, where it is possible to imply a term into the contract that the discretion exists for a particular purpose, review may be heightened to see that the decision is confined to that purpose. Second, review of fact-finding discretion should remain heightened, as it clearly was in *Braganza*, so that courts can impose rules such as the ‘cogent evidence’ standard in *Braganza*, whilst still respecting the contractual role of the primary decision-maker.

²⁷⁵ *Ibid* (CA), *Force India F1 Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051, *The Ikarian Reefer* [1995] 1 Lloyd’s Rep. 455, *Zurich Insurance v Niramax* [2021] EWCA Civ 590, [41]; *Wbeeldon Bros Ltd v Millenium Insurance Co Ltd* [2018] EWCA Civ 2403; *Grizzly Business v Stena Drilling* [2017] EWCA Civ 94

CONCLUSION

This thesis constitutes an amber light for *Braganza*. I have not argued that the decision to derive the test for review of contractual discretion from Administrative Law's *Wednesbury* was totally wrong, but nor have I accepted that a wholesale transplant of that decision, still less a wholesale transplant of all of Administrative Law's controls on discretion (most notably purpose review) can be achieved without considering the significant differences between the wider cultures and ethics of Contract Law and Administrative Law. Instead, I have argued that the *Wednesbury* test should be adapted to the contractual context, lest the transplant fail.

Firstly, the importance of the implied term to the whole availability of review in Contract Law cannot be overstated. The fact that, unlike in Administrative Law, *Braganza* controls only arise over some decision-making powers is an obvious difference. Whilst in Administrative Law, matters such as institutional competence and the nature of the power conferred only go to the intensity of review, not its availability, in Contract Law, a wide variety of decision-making powers remain off limits to the Courts. To borrow the language of Administrative Law, the sphere of "non-justiciability" in Contract Law remains many orders of magnitude greater than its dwindling influence in Administrative Law.

But more crucially on the normative side, the importance of rational self-interest to Contract Law, and the preference for the use of clear legal rules, have also been shown to pose problems for a transplant of modern *Wednesbury* review. Instead, I have suggested that traditional

Wednesbury review must be the baseline in Contract Law, with exceptions where a term implied in fact arises that the discretion should be used for a specific purpose, or where the discretion is weak (ie to determine or evaluate facts).

The likely impact of my suggested modifications is that it will be harder to challenge exercises of strong discretions when they are not tied to a specific purpose. We already see this from cases such as *PAG* and *Paragon*, but cases such as *Watson* and *Equitas* would be decided differently. The review of discretions to be used for a specific purpose would not change much, although the test for deciding whether a discretion was geared to a particular purpose would become more defendant-friendly, and the court would be more explicit about how the need to use a discretion for a particular purpose changes the question asked on a rationality review. As to control of weak discretions, the suggestions made here will not make it any harder for a claimant to challenge a finding of fact made by a decision-maker, and, where powers to decide black-and-white facts such as *Braganza* are concerned, may even make it easier.

There are two key lessons learned from this project. First, different areas of law are different, and copying a concept or rule from one area of the law, and pasting it into another is unlikely to work without taking seriously the cultural, ethical, and juristic difference between the two. Second, before such a task is undertaken, one should really ask whether it is necessary, or whether the ‘donee area’ (in *Braganza*, Contract Law) already has the tools required for the job. Granted, this would not have helped in *Braganza*, but much of the case law on improper purpose in contract law would benefit from considering whether the law on implied terms would provide a just solution.

Braganza is unlikely to be the last time the Supreme Court will be asked to transplant an idea from one area of the legal system to another, whether that be from Administrative Law to

Contract Law again, or a different pair of legal areas. When it does so, it would do well to consider the two lessons posited above.

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