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Braganza and beyond: judicial review of the exercise of contractual discretion in private law

KEY POINTS

- In the *Braganza* case in March 2015 a majority of the Supreme Court determined that it was appropriate on review to overrule an investigation left by contract to the discretion of one contracting party to ascertain how a seaman had met his death, on which depended whether his widow was entitled to compensation.
- In the two years since *Braganza*, a number of advocates have been emboldened to argue in a number of different contexts that the court on review ought to overrule decisions left by contract to the discretion of one contracting party.
- However, in that period, and especially in the context of financial services and banking, it appears that no discretionary determination has been set aside on review, and in six particular cases the court has not done so.
- Thus the *Braganza* decision may prove to have less effect than some commentators have supposed.

This article argues that notwithstanding the majority decision of the Supreme Court in *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661, English courts are justifiably continuing to exercise restraint when asked to undertake judicial review of the exercise of a contractual discretion left to the absolute discretion of one party.

In *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661, the Chief Engineer of a ship disappeared in mid-Atlantic and was presumed dead. Neither accident nor suicide seemed an obvious explanation. His widow was entitled to compensation equivalent to three years' salary, unless in the opinion of his employer or its insurers he had committed suicide. An investigation concluded that he had indeed committed suicide. In the ensuing legal action it was argued on behalf of his widow, conceded on behalf of the employer, and accepted by all judges concerned, that in accord with previous case law the investigation was subject to judicial review on similar principles to those applied in public law to judicial review of governmental action. At first instance, Teare J held on undertaking such a review that the determination of the investigation should be set aside. The Court of Appeal (Longmore, Rimer and Tomlinson LJJ) reversed that conclusion on appeal, but on 18 March 2015 the Supreme Court by a majority (Lady Hale, Lord Kerr and Lord Hodge, Lord Neuberger and Lord Wilson dissenting) restored it, arguing that the investigative decision was demonstrably flawed (and incidentally asserting that the majority was not simply substituting its own view). This was no doubt a merciful outcome. The contrary minority opinion was nonetheless cogently argued, and it may be noticed that of all of the eminent judges involved, four found for the widow, and five against. Of course the majority of the Supreme Court must prevail. This article aims to examine whether in the context of the provision of banking and other financial services (including claims by financial traders denied discretionary bonus rewards), this has since encouraged judges to adopt a more interventionist approach.

In Christopher Hare's earlier interesting and thought-provoking article 'The expanding judicial review of contractual discretion: Carte blanche or carton rouge?' [2013] 5 JIBFL 269, he scrutinised the court's claim to exercise some form of private law judicial review and control of a contractual party's exercise of a discretion given to it by a commercial contract. In particular, he examined three of the then recent cases in which the court had either exercised or refrained from exercising such control, in terms of theoretical basis and general and particular desirability, noting among other points (and this does not purport to be a comprehensive summary) that judicial review of contractual discretion is inherently in conflict between traditional concepts of freedom of contract; creates some uncertainty as to how disputes will be resolved by the courts; but is nevertheless of value in setting aside decisions by a contracting party shown to be arbitrary, capricious, perverse, irrational, whimsical, unfair, or worse in being downright dishonest.

The select cases referred to below are taken in chronological order, with greater emphasis on the determination of the case rather than recitation of case law and juridical principle expressed by way of justification of that result and the refutation of contrary submissions made by advocates. It will be seen that overall there continues to be considerable disinclination by judges to overturn decisions left by contract to the discretion of one contracting party.

First, in *Paturel v DB Services (UK) Ltd* [2016] IRLR 286, [2015] EWHC 3659 (QB) (decided on 13 November 2015), the claimant employee sued his employer the defendant bank, complaining that

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on application of the law as developed in *Braganza*, he was unlawfully denied additional bonus rewards for his work as a global finance and foreign exchange trader, payable to him in the absolute discretion of his employer. Singh J held that the claimant's pleaded case did not raise any allegation of abuse of the power to award any discretionary bonus, and struck it out; and subsequently refused the employee permission to amend in order to raise a new case of lack of fair dealing: [2015] EWHC 3660 (QB).

Second, at first sight the decision of the Court of Appeal in *Hills v Nisun Inc.* [2016] IRLR 715, [2016] EWCA Civ 115 (judgment on 1 March 2016) might seem to be to the opposite effect, in applying *Braganza* to overturn an employer's exercise of an unfettered contractual discretion whether or not to pay an employee a discretionary bonus. However, closer examination demonstrates that this was not so. The employee's contract of employment provided that the employee was entitled to such commission on sales as the employer might determine in its absolute discretion, and specified a detailed procedure for making that determination. Vos LJ, with whom Beatson and Elias LJJ agreed, held that the prescribed procedure needed to be followed, and that once the employee raised a challenge, it was for the employer to adduce evidence that the prescribed procedure had been followed; but that as the employer had chosen not to do so, it could not be assumed that the employer had indeed followed the prescribed procedure, so that the trial judge was entitled to reach his own conclusion that the employer had not done so. In short, the decision would seem to be authority only for the proposition that an employer who is bound to follow a particular contractual procedure in deciding in its absolute discretion whether to pay a bonus, must if challenged adduce evidence that it has followed that procedure, with the implication that the employer makes a strategic error if it decides not to adduce such evidence.

Third, in *Monk v Largo Foods Ltd* [2016] EWHC 1837 (Comm) (judgment on 22 July 2016), the claimants sought damages against the defendant for wrongful termination of the claimants' contract to act as the defendant's commercial agents in promoting sales of food products. The claimants argued on the basis of *Braganza* and other earlier authority, that the defendant had a discretionary power to terminate their agency, and that the court ought to control the defendant's abuse of that power by awarding damages. David Foxton QC, sitting as a Deputy Judge of the High Court, rejected that argument on the ground that the right to terminate was in the nature of an absolute contractual right rather than a contractual discretion [para 64].

Fourth, in *Brogden v Investec Bank Plc* [2017] IRLR 90, [2016] EWCA Civ 103, (decided by the Court of Appeal on 20 October 2016), each of the claimants was employed by the bank as a trader in equity derivatives, under a contract of employment promising him a salary plus bonus. A dispute arose over calculation of the contractual bonus. The bank considered that the bonus should be calculated by reference to the revenue generated by the employees, but the employees considered that the bonus should be calculated by reference to the larger sums representing the value of that revenue to the bank, so as to include the profits generated from the revenue. It was argued on the basis of *Braganza* that the bank had a discretion how to calculate the bonus, and that it was irrational for the bank to exclude the profits generated from the revenue. In the Court of Appeal Moore-Bick LJ, with whom Christopher Clarke LJ agreed, rejected that approach, holding that the calculation of the bonus was a question of interpreting the contractual language, not a question of reviewing the exercise of a contractual discretion.

Fifth, in *Lehman Brothers International (Europe) v Exxonmobil Financial Services* [2016] EWHC 2699 (Comm), Blair J (on 28 October 2016) remarked that in the context of wholesale financial markets, valuation of securities in case of default often needs to be undertaken at short notice, and that the party undertaking it is entitled to have regard solely to its own commercial interests (para [287]): however, this ultimately made no difference to his decision on the case.

Sixth and last, in *Property Alliance Group Ltd v Royal Bank of Scotland* [2016] EWHC 3342 (Ch), (decided on 21 December 2016), Asplin J comprehensively rejected a series of claims brought by a substantial property company against its bank, based on alleged mis-selling of interest rate swaps to it by the bank. The judge also rejected (Judgment, paras [241-280]) submissions on behalf of the property company that the court should follow *Braganza* in reviewing the bank's exercise of its contractual discretionary powers as commercial lender, such as its power to call for revaluations and review of security provided by the claimant property company for its borrowings (see para [260]). The judge held in effect that there was no justification in treating an agreement between sophisticated commercial lender and borrower as impliedly entitling the court to review the exercise by the lender of standard form remedies in what it perceived to be its own interest.

It is suggested that it would be difficult in any of the six cases cited above to conclude that the court was wrong to exercise judicial restraint in rejecting the argument that it should reverse on review the particular discretionary decision involved, when to all appearances there was little if anything to justify a conclusion that the decision made was arbitrary, capricious, irrational, whimsical, unfair, or downright dishonest. The *Braganza* decision may have less general effect than some other commentators have supposed. ■

Further Reading:

- The expanding judicial review of contractual discretion: Carte blanche or carton rouge? [2013] 5 JIBFL 269.
- Discretionary decision making in a commercial context [2013] 4 JIBFL 195.
- LexisPSL: Banking & Finance: Are English courts still hostile to a doctrine of good faith? [2017] 1 JIBFL 19.