

# “REASONS TO BE RATIONAL”

How to navigate the interaction between a landlord's repairing obligations and its rights to recover the costs through a commercial service charge.

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## ***Introduction:***

1. I suspect that many of us have had to advise on cases where a landlord has chosen - or would like to choose - to undertake extensive repairs to demised premises and then to recharge the costs to the tenants through a service charge mechanism, in circumstances where at least one tenant has a relatively short amount of their term left. Inevitably, the tenant is heard to complain that it is not fair that the landlord is seeking to put through the service charge the costs of an extensive repair job, which will benefit the landlord as owner of the reversion for many, many years, but for which the tenant with a dwindling term will get no real benefit.
2. In this paper, I am going to refresh your recollection of the general principles of the law of repairs and how that interacts with the principles relating to the construction of *commercial* service charge provisions.<sup>1</sup> Because I am really confident that this will be familiar to you, I am going to take this lightly.
3. Indeed, **\*\*spoiler alert\*\*** I am sure everyone in the room knows that the basic position is that the landlord gets to choose how to repair, provided that he acts prudently and reasonably when choosing and also has regard to the limited temporal interest of the tenant. What I am going to spend a bit more time on is how landlord and their advisors can reconcile the landlord's right to choose with that duty to act reasonably.<sup>2</sup>

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<sup>1</sup> Because the law of residential service charges is mired in special statutory rules, I am going to concentrate on the common law principles which apply to commercial premises.

<sup>2</sup> In other words, the first bit of this talk is in Dowding, Reynolds & Oakes, so I assume you know it or know where to find it. The second bit isn't, so I am going to spend more time on it.

***The Choice of Works Where There Is No Service Charge - Who Pays Says:***

4. Let us start with the most simple situation, without the added complication of the costs of the works of repair being recoverable through a service charge. The basic position is that the party charged with the duty to repair gets to choose the method of repair, because they bear the cost: who pays, says.<sup>3</sup>
  
5. That statement is oversimplified, because the paying party does not have a free hand to choose to do whatever he likes. First of all, there is no “repair” without “disrepair”, because “keeping in repair means remedying disrepair”.<sup>4</sup> Whether or not there is disrepair involves an evaluation of a number of contributing factors. In *Holding & Management Ltd. v. Property Holding & Investment Trust Ltd.*, Nicholls LJ said that the following factors might be material, when even construing the word “repair”.<sup>5</sup>
  - 5.1 the nature of the building;
  - 5.2 the terms of the lease;
  - 5.3 the state of the building at the date of the lease;
  - 5.4 the nature and extent of the defect sought to be remedied;
  - 5.5 the nature, extent, and cost of the proposed remedial works;
  - 5.6 at whose expense the proposed remedial works are to be done;
  - 5.7 the value of the building and its expected lifespan;
  - 5.8 the effect of the works on such value and lifespan;
  - 5.9 current building practice;
  - 5.10 the likelihood of a recurrence if one remedy rather than another is adopted;
  - 5.11 the comparative cost of alternative remedial works and their impact on the use and enjoyment of the building by the occupants; and
  - 5.12 the weight to be attached to these circumstances will vary from case to case.

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<sup>3</sup> *Plough Investments v. Manchester City Council* [1989] 1 EGLR 244 (Scott J); *Hounslow London Borough Council v. Waaler* [2017] 1 WLR 2817, [14] (CA) *per* Lewison LJ.

<sup>4</sup> See Lord Hoffmann in *Southwark London Borough Council v. Mills* [2001] 1 AC 1, 4 (HL).

<sup>5</sup> [1990] 1 EGLR 65, 68 (CA).

6. Assuming that there is repair to be undertaken, the party charged with the obligation still has to adopt such works and materials as are “prudent”, being “such methods and mode of repair as a sensible person would adopt”, and which “a competent, careful surveyor or other appropriate professional person would advise as being appropriate”.<sup>6</sup>
7. Where there is a legitimate choice of methods available to discharge an obligation, both of which are compliant with the standard set by the lease, the person bearing the obligation to undertake the work has the *prima facie* right to choose the method by which the obligation is discharged. In *Riverside Property Investments Ltd. v. Blackhawk Automotive*, HH Judge Peter Coulson QC said:<sup>7</sup>

[54](iv) if there is a dispute between replacement, on the one hand, and repair, on the other, replacement will be required only if repair is not reasonably or sensibly possible: *Ultraworth Ltd. v. General Accident Fire & Life Assurance Corporation plc* and *Dame Margaret Hungerford Charity Trustees v. Beazeley*. In the latter case, the Court of Appeal upheld the decision by the trial judge that, although everyone was agreed that a new roof was needed, the carrying out by the trustees of running repairs ensured that they complied with their repairing obligations in view of the age and character of the dwelling....

(v) if there are two ways in which the covenant might properly be performed, the tenant is entitled to choose which method to utilise. Since the tenant is almost certainly going to choose the least expensive option, it cannot be criticised for so doing: see *Ultraworth*. That position is not different to the situation concerning a claim for defects under a building contract where proper remedial works can be carried out in one of two ways. All other things being equal, the cheapest option will be appropriate: see the judgment of Judge Hicks QC in *George Fischer Holdings Ltd. v. Multi Design Consultants Ltd.*

That was a case where the repairing obligation lay on the tenant, hence the Judge’s reference to the tenant getting to choose: if the obligation to repair is the landlord’s, obviously the landlord gets to choose.

8. The party charged with the obligation to repair is not obliged to undertake either the most expensive or the cheapest prudent remedy or anything in between. The choice between methods also entitles the covenanting party to choose either the most or least extensive

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<sup>6</sup> Per Neuberger J in *Gibson Investments Ltd. v. Chesterton plc (Nº. 1)* [2002] 2 P&CR 32, [38](C)(i) and (iii) (Neuberger J).

<sup>7</sup> [2005] 1 EGLR 114 (HH Judge Peter Coulson QC).

method, even if the latter may not last as well or as long as an alternative method, provided that the method chosen is practicable. In *Murray v. Birmingham City Council*, the landlord had chosen to undertake patch repairs to a roof which had been leaking for years. The Court of Appeal rejected the argument that the roof should be replaced, Slade LJ saying:<sup>8</sup>

*[I]n any case where the landlord, or the tenant for that matter, is under an obligation to keep in repair an old roof, the stage may come where the only practicable way of performing that covenant is to replace the roof altogether ... [there was] no evidence to suggest that a piecemeal repair of the roof in 1976 right up to 1982 was not a perfectly practicable proposition. I, for my part, am quite unable to accept the submission that, merely because there had been some half a dozen, no doubt troublesome, incidents of disrepair occurring during those six years, it necessarily followed from that that the roof was incapable of repair by any way other than replacement.*

The opposite is also true, as can be seen from this observation from Blackburne J in *Fluor Daniel Properties Ltd. v. Shortlands Investments Ltd.*<sup>9</sup>

The obligations have been cast upon the landlord. It is for the landlord to decide how to discharge them. Provided it acts reasonably, it is for the landlord to decide how to go about the matter. The tenants cannot complain simply because the landlord could have adopted another and cheaper method of doing so.

9. Provided that the party charged with the obligation to repair chooses work which is “prudent”, he has a lot of latitude in other respects:

9.1 He is not limited to undertaking the most obvious solution: see, for instance, *Stent v. Monmouth District Council*, where “a sensible practical man” would repair rotting floorboards by replacing a door which was in repair, but did not fit in the frame.<sup>10</sup>

9.2 He can also justify undertaking an element of work which is clearly beyond that which is immediately needed to “repair”, perhaps because it is cost effective to do reasonably anticipated future works as part of a single programme: see *Reston v.*

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<sup>8</sup> [1987] 2 EGLR 53, 55B (CA).

<sup>9</sup> [2001] 2 EGLR 103 (Blackburne J).

<sup>10</sup> (1987) 54 P&CR 193, 211 (CA) *per* Sir John Arnold P.

*Hudson*, where the landlord was entitled to replace not only certain rotten window-frames, but also those which had not yet rotted as it was much cheaper to do the job all in one go.<sup>11</sup>

9.3 It can equally justify doing a short-term stop-gap repair, pending investigations into a suitable long-term solution, even though that means repairing the building twice: see *Blue Manchester Ltd. v. North West Ground Rents Ltd.*<sup>12</sup>

10. It is worth pausing to remind ourselves that “prudent” implies an objective standard. A “prudent” decision is one within the range of “such methods and mode of repair as a sensible person would adopt”, and which “a competent, careful surveyor or other appropriate professional person would advise as being appropriate”.<sup>13</sup> This means that the remedy adopted does not have to be the “best”, in the sense of being the decision most sensible, well-advised persons would have to adopt. It simply has to be within the range of permissible decisions. It is in the nature of any normative standard, such as “reasonableness” or “prudence” that there does not have to be a single solution which is objectively “right” or “best”: all the decision-taker has to be is somewhere within the range of acceptable decisions. Indeed, in the slightly different context of landlords’ consents, the Supreme Court has recently reiterated that a reasonable decision does not have to be objectively “right” or “justifiable”; it only has to be one which sits within the spectrum of decisions which persons in the same position might take: see *Sequent Nominees Ltd. (formerly Rotrust Nominees Ltd.) v. Hautford Ltd.*<sup>14</sup>

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<sup>11</sup> [1990] 2 EGLR 51 (HH Judge Hague QC, sitting as a Judge of the Division).

<sup>12</sup> [2019] L&TR 13 (HH Judge Stephen Davies, sitting as a Judge of the High Court, T&CC).

<sup>13</sup> *Per* Neuberger J in *Gibson Investments*: see footnote 6.

<sup>14</sup> [2019] 3 WLR 981 (UKSC) at [23] and [42] *per* Lord Briggs JSC, Lord Carnwath and Lord Hodge JJSC agreeing. Lady Arden and Lord Wilson JJSC agreed as to the legal principles, but dissented as to their application. See further *Ashworth Frazer Ltd. v. Gloucester City Council* [2001] 1 WLR 1280 (HL), particularly *per* Lord Bingham at [5].

### ***Spending Other People's Money:***

11. The freedom of action afforded a landlord charged with the duty to repair is further curtailed where he has the right to recover the costs through service charges. Subject to the express terms of the lease, the landlord now has to be more respectful of the fact that he is spending other people's money. In *Finchbourne Ltd. v. Rodrigues*, Cairns LJ said:<sup>15</sup>

It cannot be supposed that the [*landlords*] were entitled to be as extravagant as they chose in the standards of repair ... In my opinion, the parties cannot have intended that the landlords should have an unfettered discretion to adopt the highest conceivable standard and to charge the tenant with it.

The most important fetter on the landlord's freedom of choice here is that the landlord must have regard to the fact that the tenant has a more limited temporal interest in the premises - even if their leases have relatively long terms. As Nicholls LJ said in *Holdings & Management Ltd. v. Property Holding & Investment Trust Ltd.*:<sup>16</sup>

A prudent building owner bearing the costs himself might well have decided to adopt such a scheme despite its expense. But what is in question is whether owners of 75-year leases in the building could fairly be expected to pay for such a scheme under an obligation to "repair".

12. Equally, the tenants cannot *necessarily* insist on the landlord undertaking the cheapest prudent method of repair, at least without something in the specific wording of the lease to rely on. In *Plough Investments Ltd. v. Manchester City Council*, Scott J said:<sup>17</sup>

... the tenants are not entitled to require the landlord to adopt simply a minimum standard of repair. Provided proposed works of repair are such as an owner who had to bear the cost himself might reasonably decide upon and provided the works constitute "repairs". ... the tenant is not, in my judgment, entitled to insist upon more limited works or cheaper works being preferred.

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<sup>15</sup> [1976] 3 All ER 581, 587 (CA).

<sup>16</sup> [1990] 1 EGLR 65, 69 (CA). This point is not reported at [1989] 1 WLR 1313.

<sup>17</sup> [1989] 1 EGLR 244 (Scott J).

13. Of course, specific wording in the lease may drive the court to a different conclusion. In *Scottish Mutual Assurance plc v. Jardine Public Relations Ltd.*, the service charge provision obliged the tenant covenanted to pay a fair proportion of the sums:<sup>18</sup>

reasonably and properly expended incurred or expected to be so expended or incurred by the landlord in relation to the Property computed upon the basis of providing an indemnity to the Landlord in respect of the services

To repair the roof, the landlord could have undertaken piecemeal repairs to provide a short term solution or it could have re-covered the roof. The landlord opted for the latter. The Judge held that whilst the work was repair within the landlord's obligation and the choice was his to make, the cost was not recoverable by way of service charge because the service charge clauses needed to be construed in context. The lease was for a term of three years and was "contracted out". The Judge said:<sup>19</sup>

In my judgment this lease does not entitle the landlord to charge to the tenant the cost of carrying out works suitable for the performance of his obligations over a period of twenty or more years when such works are not necessary for the fulfilment of those obligations over the actual period to which they relate. In the present case, of course, the *[tenant]* is only one of a number of tenants. The leases relating to these other tenancies were not before me, but there was evidence that they were for 25 year terms expiring on the 24 December 2002. In those circumstances it might well be that the three other tenants would be unable to resist contributing fully to repairs of a long-term nature, but it does not follow from that that *[this tenant]* is bound to be treated in the same way.

In my judgment, *vis-a-vis* the *[tenant]* the totality of the amounts expended by the *[landlord]* on the works to the roof was not "reasonably and properly expended or incurred" because those works went significantly beyond what was required for the performance of the *[landlord]*'s obligations to the *[tenant]* in respect of the condition of the premises, *[and]* because ... there was therefore no pressing need to commence long-term repairs prior to the end of the *[tenant]*'s term (which end was imminent).

Note that the first paragraph is addressing the choice of works, but the second paragraph is addressing the recoverability of the costs more generally.

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<sup>18</sup> [1999] EGCS 43 (Mr. David Blunt QC, sitting as a judge of the Technology and Construction Court). The full transcript is available on both *Westlaw* and *Lexis Library*.

<sup>19</sup> In the interests of readability, I have reparagraphed the following extract from the transcript.

14. Blackburne J reviewed the previous cases in *Fluor Daniel Properties Ltd. v. Shortlands Investments Ltd.* Although he accepted that the obligation to repair was the landlord's and it was for the landlord to choose the method of repair, "provided it acts reasonably", he went on to say that the landlord had always has to have regard to the tenant's limited interest in the premises. The landlord's choice of works:<sup>20</sup>

... must be such as the tenants, given the length of their leases, could fairly be expected to pay for. The landlord cannot, because he has an interest in the matter, overlook the limited interest of the tenants who are having to pay by carrying out works that are calculated to serve an interest extending beyond that of the tenants. If the landlord wished to carry out repairs that go beyond those for which the tenants, given their more limited interest, can fairly be expected to pay for, then, subject always to the terms of the lease or leases, the landlord must bear the additional cost himself.

Although Blackburne J was addressing the choice of works, by parity of reasoning the same must apply to the recoverability of the costs, having regard to the logic of the decision in *Jardine*, even though the case was concerned with particular words.

*The bottom line:*

15. The bottom line is this: where the landlord has the obligation to repair but the right to recover the costs through a service charge, his freedom to choose the appropriate scheme of works necessary to comply with the obligation is constrained by a duty:

15.1 to undertake only the sort of "prudent" and "reasonable" works he would undertake if he was paying himself; and

15.2 are not so extensive that they include works which go beyond the works which the tenants could fairly be expected to pay for, having regard to the tenant's more limited interest in the premises.

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<sup>20</sup> [2001] 2 EGLR 103, 111 (Blackburne J).



16. That is the law and it is moderately easy to state. What is quite a lot harder is actually advising a client - and their professional advisors - what that means in practical terms. It is clear that the landlord has to act “prudently”, but what does that actually require him to do when assessing different schemes? It is also clear that the landlord has to “not overlook” the tenant’s more limited interest in the premises, as all leases end one day. What does the landlord need to do to take that into account? What does he need to do to *show* that he has done it? For that matter, how can a tenant go about challenging any particular decision that the landlord has come to and how might the tenant estimate his prospects of making a successful challenge?
17. Obviously, each case turns on its own facts and it’s all terribly difficult. That does not, however, mean that we cannot take the advice of the Supreme Court on how to assessing whether a decision taken pursuant to a contractual power has been taken rationally and reasonably.

***Rational Decision Taking for Beginners:***

18. Anybody who has traipsed home from a particularly bad day in court, whether as lawyer, advisor, witness or client, will have their own doubts as to whether the judiciary are as good at rational decision-taking as they might think they are. And some weary traipsers might even think that, the more senior the court, the less they are bothered about the rationality of their own decision-taking.
19. Be that as it may, the last few years have seen a series of cases, from the Supreme Court down, where the courts have explored and explained how private individuals and companies, such as commercial landlords, should act when exercising any form of discretionary power given to them by a contract. The leading case is a decision of the Supreme Court, *Braganza v. BP Shipping Ltd.*<sup>21</sup> What the Supreme Court has said about

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<sup>21</sup> [2015] 1 WLR 1661 (UKSC).

how a contractual power or discretion should be exercised has become known as the “*Braganza Duties*”.

20. For the moment, I am going to leaving aside whether the law has, or will, evolve to the point where these *Braganza Duties* already apply to commercial landlords exercising a power to choose between alternative methods of remedying disrepair. For now, I am going to explain what the *Braganza Duties* are and why it might be beneficial to approach all cases about the choice of remedy, on the basis that the *Braganza Duties* are applicable, even if the law has not yet gone so far as to say that these Duties apply universally.
21. The reasons I suggest that this is prudent are threefold. First, the *Braganza Duties* are an intrinsically sensible way of coming to a rational decision on any given point. Where the landlord has exercised a power and made a choice rationally and reasonably, all other things being equal, it ought to be beyond serious challenge by the tenant.
22. Secondly, it is often the case that the landlord (and/or his advisors) has arrived at a decision which is actually rational, but have failed to fully evidence the decision-taking process contemporaneously. A conscious application of the substance of the *Braganza Duties* during the decision-taking process ought to guide the decision-taker into creating a contemporaneous audit trail of what he was doing. This will not only insulate the decision taker from challenge, but it will also assist evidentially if the challenge to the decision does not manifest itself - say by cross-examination - for a number of years. Courts are generally, and for good reason, well aware that recollections unsupported by contemporaneous documents tend to correlate with commercial interests.<sup>22</sup>

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<sup>22</sup> “... it would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory” *per* Sir John Popham CJ, *The Countess of Rutland’s Case* (1604) 5 Co Rep 25b, 26a. In *Onassis v. Vergottis* [1968] 2 Lloyd’s Rep 403, 431 (HL) Lord Pierce observed: “with every day that passes the memory becomes fainter and the imagination becomes more active”.

23. Sure, there will be cases where that process will give the tenant evidence by which he can demonstrate the irrationality of a particular decision, but that's just life. If a decision is tainted by irrationality, the chances are the tenant will be able to dig it out of the totality of the evidence eventually. Perhaps what is more important is the point that any exercise of a discretion has to be capable of being tested. A decision which cannot be tested and found either sound or unsound is likely to be held to be irrational because it is incapable of being tested. Any exercise of a discretion has to be capable of being proved right - or wrong.
24. Thirdly, sooner or later, some court somewhere might decide that the *Braganza* Duties do apply to a commercial landlord exercising a choice as to which remedy to undertake and then put the costs through a service charge. If that case happens to be *your* case, it is better to be the landlord who correctly assumed that the *Braganza* Duties applied than to be the landlord who did his thinking on the back of a fag packet, since discarded.

***The “Braganza Duties”:***

25. So, what are these *Braganza* Duties? The facts of the *Braganza* case itself are terribly sad. Chief Engineer Braganza was an officer aboard the ship “*MV British Unity*”, a petrochemical tanker operated by BP Shipping Ltd., his employer. Chief Engineer Braganza disappeared when the ship was in the mid-Atlantic. It could not be established if he had fallen overboard or if he had committed suicide.
26. His contract of employment with BP provided for his next of kin to receive a death in service payment, provided that BP was of the opinion his death had not resulted from a “wilful act”:

... 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

BP refused to pay on the basis that it was of the opinion that Chief Engineer Braganza had committed suicide. His widow sued for the payment of the benefit, on the basis that it was irrational to have so concluded, on such evidence as was actually before BP. Getting to the

important bit first, the majority of the Supreme Court agreed with Mrs. Braganza that BP's decision was irrational as a matter of fact, and that the only rational decision BP could have arrived at was that there had been an accident. Mrs. Braganza received the payment.<sup>23</sup>

27. On the law, the Supreme Court was united. In short, the Court held that, as a matter of principle, where any contract gives one party a power to exercise a discretion would affect the rights and obligations of both parties, and could give rise to a conflict of interest, the court was entitled to ensure that the power was not abused. The potential for an abuse of power was controlled by the implication of two duties.

27.1 The first duty is to exercise the power in good faith, without acting arbitrarily, capriciously or irrationally. This can be called the "Outcome Duty".

27.2 The second duty is to ensure that the decision-making process is fair, excluded all extraneous considerations and took into account all obviously relevant ones. This can be called the "Process Duty".

Provided that the decision-taker had complied with those duties, the court should not intervene, even if it disagreed with the decision taken.<sup>24</sup>

28. There is nothing new in this approach of imposing on a decision-taker a duty to act rationally in respect of the outcome and a separate duty to insure the integrity of the decision-taking process. For those of us who studied "public law" in the days when it was still called "administrative law", these two duties might be dimly familiar from the famous "*Wednesbury*

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<sup>23</sup> Lord Neuberger PSC and Lord Wilson JSC agreed on the law, but held that BP's decision was rational, if regrettable, and therefore should not be disturbed by the Court. It is tolerably obvious from paragraph [108], *per* Lord Neuberger, that they thought the majority had let their hearts rule their heads.

<sup>24</sup> Although, of course, that is exactly what Lord Neuberger and Lord Wilson thought that the majority of Baroness Hale, Lord Kerr and Lord Hodge were doing.

test” set by Lord Greene MR in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*.<sup>25</sup> Here is what he said, reparagraphed to make the distinction clear:

*[The Process Duty]*

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

*[The Outcome Duty]*

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

Thus, it was reasonable to insist that children under fifteen could not go to the cinema in Wednesbury on a Sunday, unless accompanied by an adult.

29. Baroness Hale observed in *Braganza* that the previous cases on decisions taken by private individuals or companies had all decided that these contractual decision makers were *not* subject to the same stringent requirements as public bodies exercising statutory duties, as epitomised by *Wednesbury*.<sup>26</sup> However, as she then went on to say, all of those previous cases had struggled to articulate what the differences between public bodies and private persons exercising discretions actually were. The Supreme Court unanimously resolved that particular difficulty by holding that, generally, there were no real differences between the two.<sup>27</sup>

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<sup>25</sup> [1948] 1 KB 223, 233-234 (CA). Somervell LJ and Singleton J agreed.

<sup>26</sup> At [18].

<sup>27</sup> At [30] *per* Baroness Hale (Lord Kerr JSC agreeing) and at [103] *per* Lord Neuberger (Lord Wilson agreeing). Baroness Hale hedged a bit, at [32], saying that different contracts may require different applications of these implied duties. Lord Hodge JSC (with whom Lord Kerr also agreed) also agreed with the majority, at [44] and [53], but he was more cautious, expressly limiting his judgment to cases relating to contracts of employment. As will be seen, the courts below have been more gung-ho.

*The Outcome Duty:*

30. Let us look at the Outcome Duty in a little more detail. Whilst the members of the Supreme Court were united behind the Baroness Hale's judgment that any contract which conferred a power to exercise a contractual discretion contained an implied duty not to exercise that power arbitrarily, capriciously or irrationally, they were not directly forthcoming about what that implied duty actually requires.
31. However, Baroness Hale's judgment approved three extracts from earlier cases which discussed what it takes to discharge the outcome duty in a little more detail. First, Baroness Hale approved this from Lord Sumption's judgment in *British Telecommunications plc v. Telefónica O<sub>2</sub> UK Ltd.*:<sup>28</sup>

[37] .... As a general rule, the scope of a contractual discretion will depend on the nature of the discretion and the construction of the language conferring it. But it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously: ... This will normally mean that it must be exercised consistently with its contractual purpose ...

It is important to note that Lord Sumption is not referring to the *overall* purpose of the contract: he is directing the decision taker to direct his mind to the contractual purpose behind the *specific* discretion.

32. That is not an unusual concept, even in the law of landlord and tenant. Many of us will be familiar with landlords' duties not to unreasonably withhold consent to tenants' applications for consent to alter or alienate or change the permitted use. The leading case remains *International Drilling Fluids Ltd. v. Louisville Investments Ltd.*, recently approved by the Supreme Court in *Sequent Nominees Ltd. v. Hautford Ltd.*<sup>29</sup> Balcombe LJ, held that the purpose of the covenants against change of use and against alienation without the consent of the landlord is to protect the landlord from having his premises used or occupied in an

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<sup>28</sup> [2014] Bus LR 765 (UKSC). This passage was quoted by Baroness Hale DPSC in paragraph [27], although I have removed the lengthy references to authority.

<sup>29</sup> [2019] 3 WLR 981 (UKSC).

undesirable way.<sup>30</sup> As a corollary the landlord is not entitled to refuse his consent on unconnected grounds, which might confer an uncovenanted-for advantage to the landlord at the tenant's detriment.<sup>31</sup>

33. Going back to the cases approved in *Braganza*, the next case Baroness Hale approved was *Socimer International Bank Ltd. v. Standard Bank London Ltd.*<sup>32</sup> In the passage from that case which was approved, Rix LJ held that a decision-taker must take the decision with "honesty, good faith, and genuineness", as opposed to "arbitrariness, capriciousness, perversity and irrationality". Rix LJ distinguished these requirements from a requirement of "reasonableness", which imposes a higher standard. Baroness Hale agreed: she held that although there may be cases in which there might be an implied duty to come to a reasonable decision, this was not a duty of universal application.<sup>33</sup> The Outcome Duty was limited to a duty to take a "rational" decision, not a "reasonable" one.
34. Baroness Hale then went on to explain what she meant by "rationality" and "irrationality", by approving Lord Sumption's explanation of "rationality" in *Hayes v. Willoughby*:<sup>34</sup>

A test of rationality ... applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse.

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<sup>30</sup> [1986] Ch 513, 519-520 (CA). Mustill and Fox LJJ agreed. As well as being approved in *Sequent Nominees*, the *IDF* case was also approved in *Ashworth Frazer Ltd. v. Gloucester City Council* [2001] 1 WLR 2180 (HL).

<sup>31</sup> For an interesting example of an "ulterior motive" case, see *Ansa Logistics Ltd. v. Towerbeg Ltd.* [2012] EWHC 3651 (Ch), [70] (Floyd J).

<sup>32</sup> [2008] Bus LR 1304, [66] (CA).

<sup>33</sup> At [29]-[30].

<sup>34</sup> [2013] 1 WLR 935 (UKSC); approved at [23] by Baroness Hale.

Baroness Hale emphasised the difference between “rationality” and “irrationality” by referring to the test for irrationality applied in public law, as explained by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*:<sup>35</sup>

By “irrationality” I mean ... a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.

35. Although Baroness Hale did not say this, it is implicit in her discussion of rationality that the decision-taker would be well-served by making a contemporaneous note of how he arrived at his decision. Indeed, the process of writing down the specific reasons for taking a decision is often a very good way for the decision-taker to satisfy himself that his underlying reasons for the decision are not “arbitrary, capricious, perverse or irrational”. Moreover, it is a lot cheaper and easier for the decision-taker to drill down into his own reasons for taking a decision than to have some Wig cross-examine them out of him a couple of years later.

*The Process Duty:*

36. I turn next to the “Process Duty”. The Supreme Court in *Braganza* did not spend much time on explaining the Process Duty: it really only discussed it by reference to the first limb of the *Wednesbury* case, being a duty “to exclude extraneous considerations” and to “take into account those considerations which are obviously relevant to the decision in question”.<sup>36</sup>
37. It is inherent in even that simple explanation of the Process Duty that the decision-taker must also ensure that there is fairness in the decision-taking process itself. If the decision is taken after an unfair process, the decision-taker has almost inevitably failed “to exclude extraneous considerations” and/or has “taken into account those considerations which are obviously relevant to the decision in question”.

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<sup>35</sup> [1983] AC 374, 410 (HL); also approved at [23] by Baroness Hale.

<sup>36</sup> *Per* Baroness Hale at [28], with whom Lord Kerr agreed. Lord Hodge specifically agreed with this point at [53] and Lord Neuberger and Lord Wilson agreed at [103]. The second limb of the *Wednesbury* test is the Outcome Duty.



38. The Process Duty has been explored much more fully by Sir Geoffrey Vos C in *Victory Place Management Co.Ltd. v. Kuehn*.<sup>37</sup> This is case of Vinnie the dog. Mr. and Mrs. Kuehn wanted to share their flat with their dog, Vinnie. Their lease provided that no dog could be kept in a flat, “without the written consent of the Management Company”. There was no express obligation on the Man.Co. not to unreasonably withhold consent.

39. The Man.Co. refused to permit Vinnie to move in. Its letter of refusal said:

Although our client will always consider special circumstances (such as a requirement for a guide dog), in the absence of any ... it is proper for our client to apply a blanket ban on dogs.

Vinnie challenged this decision on the basis that applying “a blanket ban on dogs” caused Man.Co. to predetermine the application in breach of the Process Duty.

40. Sir Geoffrey Vos C held that, as a matter of principle, the Process Duty applied to the exercise of the Man.Co.’s discretion and, in consequence, a blanket application of a predetermined policy *would* have been a breach of that Duty. Sir Geoffrey held that the correct approach to assessing compliance with a Process Duty was to be found in the judgment of Ouseley J in a planning case, *Bovis Homes Ltd. v. New Forest District Council*.<sup>38</sup>

41. In the judgment of Ouseley J and Sir Geoffrey Vos, a decision-taker is entitled to have a legitimate predisposition towards a particular point of view. However, this tips over into a breach of the Process Duty when that predisposition becomes a predetermination of the outcome. If a decision-taker is determined to reach a particular decision, or to adhere to a particular view, regardless of the relevant factors or how they could be weighed, it will breach its Process Duty.

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<sup>37</sup> [2018] EWHC 132 (Ch); [2018] HLR 26 (Sir Geoffrey Vos C).

<sup>38</sup> [2002] EWHC 483 (Admin), [111]-[112] (Ouseley J).

42. The Process Duty requires fairness in the decision-taking process because it demands that the decision-taker weighs and balances all obviously relevant factors, disregards the irrelevant and, as part of that process, it demands the taking into account of any other viewpoints, which may justify a different balancing of the various relevant factors. It therefore matters not whether that predetermination is caused by the adoption of an inflexible policy, or by the closing of the decision-taker's mind to the fair consideration and weighing of the relevant factors.
43. Perhaps what is more important from our point of view as advisors, Ouseley J and Sir Geoffrey were agreed that a decision-taker who wholly delegated the taking of a decision to a third party would be in breach of the Process Duty.<sup>39</sup>
44. Having identified the legal principles, the Chancellor then found, as a matter of fact, that the Man.Co. had sufficiently considered the application to have satisfied the "Process Duty".<sup>40</sup> The board was able to prove that they had discussed and genuinely considered allowing Vinnie to move in - if he could demonstrate that he was an "assistance dog".<sup>41</sup> Sir Geoffrey stressed that "context is everything" and the relative informality of the decision-taking process was not to count against the board. That said, a bit more formality might have avoided the board members being extensively cross-examined over the course of a three-day trial as to how they took the decision.<sup>42</sup>
45. One last thing before I leave poor old homeless Vinnie. His case was not put before Sir Geoffrey on the basis that there had been a breach of the Outcome Duty. However, the

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<sup>39</sup> One can take this too far: if a decision is lawfully delegated to an agent in the strict legal sense, then a decision of an agent is a decision of the agent's principal. The risk is that some contractual powers are not capable of delegation. The safer answer is simply to avoid delegation to a third party, as opposed to an employee or officer of the company.

<sup>40</sup> At [38].

<sup>41</sup> It had been said in correspondence that Vinnie was an assistance dog, but this was never put in evidence.

<sup>42</sup> See the Chancellor at [21]: he was sitting on an appeal from the poor soul who had to try the case in CCLC, HH Judge Cryer.

Judge said, *obiter*, that the Outcome Duty applied, even though the “no pets” clause did not prohibit any unreasonably withholding of consent. He considered that a “no pets without consent” clause was for the benefit of individual tenants, as well as the residents of the block collectively and for the benefit of the Man.Co. as manager of the block. This potential divergence of interest triggered the Outcome Duty, as identified in the *Braganza* case. Accordingly, when deciding whether to give the dog a home, Man.Co.:

[33] ... obviously ... should behave reasonably in considering whether or not to grant consent. Reasonableness in that context involves both a reasonable process and a rational outcome.

### ***Is There Going to Be a Braganza Bonanza?***

46. How widely do the *Braganza* Duties apply? Are we on the brink of a *Braganza* bonanza? Such evidence as we have within the law of landlord and tenant suggests an emphatic affirmative.
47. Vinnie did not appeal the Chancellor’s decision. However, it seems that there will be an appeal in *Hicks v. 89 Holland Park (Management) Ltd.*<sup>43</sup> This is a case concerned with the withholding of approval of plans and of consent to build, pursuant to a freehold restrictive covenant. HH Judge Pelling QC, sitting as a Judge of the High Court, followed Vinnie’s case, to hold that *Braganza* Duties applied to matter before him.<sup>44</sup> An appeal to the Court of Appeal is pending.
48. I do not know if the application of the *Braganza* Duties will be before the Court of Appeal. If so, the Court of Appeal has already shown no little enthusiasm for them in *Nº.1 West India Quay (Residential) Ltd. v. East Tower Apartments Ltd.*<sup>45</sup> The landlord had given consent to assign, subject to three conditions. One was held to be unreasonable: the landlord had charged £350.00 + VAT for the licence itself, which was greater than the actual cost to it of

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<sup>43</sup> [2019] EWHC 1301 (Ch) (HH Judge Pelling QC, sitting as a Judge of the High Court).

<sup>44</sup> At [53]-[56].

<sup>45</sup> [2018] 1 WLR 5682 (CA).

granting the licence.<sup>46</sup> The Court of Appeal confirmed that one bad condition does not vitiate a decision, provided that the other reasons and conditions were good ones. Neither proposition was legally controversial,<sup>47</sup> which illuminates the enthusiasm shown by Lewison LJ for importing *Braganza* into this context: there was no need to apply the *Braganza* Duties. Nevertheless, Lewison LJ (with whom Floyd and Peter Jackson LJJ agreed) said:

[37]                    Since the landmark decision of the Supreme Court in *Braganza v. BP Shipping Ltd.* we have also learned that the exercise of a contractual discretion is to be judged by the same principles as the exercise of public law discretions. A line of cases in that field has held that where a decision maker gives a good reason and a bad reason for a decision, there are cases in which the good reason is enough to support the decision. ...

49.    Lewison LJ had already applied the *Braganza* Duties to the question of whether costs were “reasonably incurred” in the context of residential service charges and the Landlord and Tenant Act 1985, section 19(1)(a). This was in *Waler v. Hounslow London Borough Council*.<sup>48</sup> The Council, as freeholder, decided that the best way to keep a block of flats “in good repair and condition” was to replace the wooden-framed windows with metal units, even though that would require the replacement of the cladding and the removal of some asbestos. The costs would be passed onto the tenants, who included Miss. Waler, through a service charge. They challenged the decision on the basis that, had the Council had regard to their limited temporal interest in the block and their financial position, it should have either repaired the wooden frames or borne the cost of the works as an improvement.
50.    The Upper Tribunal and the Court of Appeal agreed with Miss. Waler. Lewison LJ thought that was obvious that the *Braganza* Duties applied:

[23]                    ... In my judgment Hounslow’s contractual ability to undertake improvements whose cost is to be passed on to the lessees is constrained by these [*Braganza*] principles. In my judgment therefore the rationality test applies to both a choice as between different methods of repair and also to a decision whether to carry out optional improvements.

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<sup>46</sup> This was the law anyway: *Dong Bang Minerva (UK) Ltd. v. Davina Ltd.* [1996] 2 EGLR 31 (CA).

<sup>47</sup> This was also the law anyway: *British Bakeries (Midlands) Ltd. v. Michael Testler & Co.* [1986] 1 EGLR 64 (Peter Gibson J); *BRS Northern Ltd. v. Templeheights Ltd.* [1998] 2 EGLR 182 (Neuberger J).

<sup>48</sup> [2017] 1 WLR 2817 (CA).

Burnett and Patten LJJ agreed. The Council's decision complied with the *Braganza* Duties, but it failed on the basis that the costs were not "reasonably incurred" for the purposes of the Landlord and Tenant Act 1985, section 19(1)(a).

51. Although *Waler* was a residential landlord and tenant case, Lewison LJ separated his application of the *Braganza* duties from his consideration of the special statutory regime under the 1985 Act. To me, the message is clear: any landlord exercising a choice as to which methods of repair to choose must now discharge the *Braganza* Duties, whether or not the costs are to be passed on through a service charge and irrespectively of whether the subject property is commercial or residential.

52. There is only one obvious limitation on the imposition of the *Braganza* Duties. As Baroness Hale acknowledged, the imposition of the *Braganza* Duties is a result of there being an implied term into the contract.<sup>49</sup> As Lord Parker explained in *Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.Ltd.*, no term can be implied which is inconsistent with, or contrary to, the intention of the parties, as discerned from the express terms.<sup>50</sup> It would probably take an extraordinary clause in a repairing covenant to authorise a landlord making an *irrational* choice of works, but I suppose anything is possible...

***Conclusion - Reasons to Be Rational are Reasons to Be Cheerful:***

53. In light of *Waler*, the landlord's the right to choose to implement works of repair at the costs of which will be recovered through a service charge is clearly constrained by the *Braganza* duties - even in respect of commercial premises.

54. This is good for tenants wishing to challenge their landlords' decisions, but it is also good for landlords, too. If the landlord takes a decision to undertake works which:

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<sup>49</sup> At [30]-[31].

<sup>50</sup> [1916] 2 AC 397, 422 (HL).

- 54.1 discharges the Process Duty;
- 54.2 specifically considers the impact of the decision on the tenants, especially a tenant who might have been granted a short term, or might only have a short amount of their original term left;
- 54.3 discharges the Outcome Duty;
- 54.4 is “prudent”, in the sense that it is a choice which a competent and careful surveyor would advise as *an* appropriate solution (not *the* best or most appropriate solution);  
and
- 54.5 is properly documented, so it can be seen that the various duties have been discharged; then

the decision is highly likely to be an objectively sound decision which is incapable of serious challenge. It might not be a decision that the tenant - or even the landlord - might have wanted to have arrived at, but at least the time and cost of a pointless challenge are avoided.

- 55. With challenges in mind, I think that the last words ought to be these words of caution and, indeed, prudence from Mocatta J, in *The MV Vainqueur José*:<sup>51</sup>

Where, as here, the success or failure of a claim depends on the exercise of a discretion by a lay body, it would be a mistake to expect the same expert, professional and almost microscopic investigation of the problems, both factual and legal, that is demanded of a suit in a court of law.

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<sup>51</sup> [1979] 1 Lloyd's Rep 557, 577 (Mocatta J). Approved in *Braganza* by Baroness Hale at [31] and Lord Neuberger at [122]

56. Keep that in mind, and I think that you will find that the reasons to be rational are also reasons to be cheerful.



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If anybody cares, I am a senior-junior barrister and a member of Landmark Chambers. Inexplicably, I have been rated as a top-tier junior for real estate litigation by both *Chambers & Partners* and *Legal 500* for over fourteen years. I was *Chambers' and Partners* Real Estate Litigation Junior of the Year 2011.

I deal with just about any aspects of real estate, but with an emphasis on valuation disputes, such as cases involving dilapidations, lease renewals under the Landlord and Tenant Act 1954 and rent reviews. I also specialise in advising on conveyancing issues, either before or after the transaction. Being at heart an anarchist, I have undertaken very many “Ground (f)” cases, although I am more comfortable with demolition than reconstruction. Despite loathing mobile phones, I am regularly involved in Electronic Communications Code cases, for either “operators” or “site providers”. I also take on some *recherché* matters that no-one else in Chambers really wants to do, such as mines and minerals, manorial and customary rights, utility wayleaves, riparian rights and drainage. I am a qualified arbitrator but lack the disposition to be a mediator.

For laughs, I am an editor of *Hill & Redman's Law of Landlord and Tenant*, a member of the editorial boards of both *The Conveyancer* and *The Journal of Building Survey, Appraisal & Valuation*, a member of The Law Society's Conveyancing and Land Law Committee, and a member of the RICS Dilapidations Steering Group. I appreciate that I need to get out more. My CV and other potentially tall tales can be seen at: [www.landmarkchambers.co.uk/people/nicholas-taggart/](http://www.landmarkchambers.co.uk/people/nicholas-taggart/)