Barking Up The Right Tree

Irrationality, unreasonableness and consent in property contracts

Christopher Heather Q.C.

TANFIELD

Introduction: *Braganza*

***Braganza v BP Shipping Ltd* [2015] 1 WLR 1661**

- Contractual death in service benefit

  "… *not be payable if, in the opinion of the company or its insurers, the death … resulted from amongst other things, the officer's wilful act, default or misconduct…*"

TANFIELD

Braganza (2)

"Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties' bargain for them, still less to substitute themselves for the contractually agreed decision- maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest..."

TANFIELD

Braganza (3)

"… That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision- making power is given."

Baroness Hale DPSC at [18]

TANFIELD

Braganza (4)

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

Baroness Hale DPSC at [19]

Wednesbury Unreasonableness

***Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223**

"The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

Lord Greene MR at 233-234

TANFIELD

Wednesbury Unreasonableness (2)

Two limbs:

- the decision-making *process* - whether the right matters have been taken into account in reaching the decision.
- *outcome* - whether, even though the right things have been taken into account, the result is so outrageous that no reasonable decision- maker could have reached it.

TANFIELD

Braganza (concluded)

- The term to be implied will "*depend on the terms and the context of the particular contract involved*." [31].
- The standard of the decision making process may vary: "*It may very well be that the same high standards of decision making ought not to be expected of most contractual decision-makers as are expected of the modern state*." [31]
- However, it was "*unnecessary to reach a final conclusion on the precise extent to which an implied contractual term may differ from the principles applicable to judicial review of administrative action … it may well be that no precise answer can be given*" [32]

TANFIELD

Contract v Statute: *Waaler* (1)

***Waaler v Hounslow LBC* [2017] 1 WLR 2817**

Tenant covenant: *"If and when the council shall make any improvements … upon the service of a written demand pay to the council a fair proportion of the cost of the improvement"*

Contract -

- Where there is a choice of methods of carrying out repair, the choice is that of the covenantor, provided the choice is reasonable: ***Plough Investments Ltd v Manchester City Council*** [1989] 1 EGLR 244
- What does *reasonable* mean?

TANFIELD

Waaler (2)

Statute -

Landlord and Tenant Act 1985

s.18(1) – "service charge" means an amount payable by a tenant of a dwelling … for services, repairs, maintenance, improvements … the whole or part of which varies … according to the relevant costs"

19(1) Relevant costs shall be taken into account in determining the amount of a service charge … only to the extent that they are reasonably incurred …

Waaler (3): reasonableness v rationality

"Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions … A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes."

Lord Sumption JSC in ***Hayes v Willoughby*** [2013] 1 WLR 935 at [14]

TANFIELD

Waaler (4)

- Council's contractual ability to undertake improvements whose cost is to be passed on to the lessees is constrained by these principles.
- The rationality test applies both to a choice as between different methods of repair and also to a decision whether to carry out optional improvements.
- Is the question whether costs are reasonably incurred within the meaning of s.19 to be answered by reference to an objective standard of reasonableness, or by the lower standard of rationality?

TANFIELD

Waaler (5)

- LTA 1985 must have been intended to provide protection against costs which, but for its operation, would have been contractually recoverable.
- Merely applying a rationality test would not give effect to the purpose of the legislation.
- Section 19 must have been intended to protect the leaseholder against charges that were contractually recoverable otherwise it would serve little useful purpose.

TANFIELD

Waaler (6)

- Whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome. There may be may outcomes each of which is reasonable.

- If the landlord has choices a course of action which leads to a reasonable outcome the costs of pursuing that course of action will have been reasonably incurred, even if there was another cheaper outcome which was also reasonable.

TANFIELD

Waaler (7)

- Same *legal* test applies to all categories of work which fall within the scope of the definition of “service charge” in s.18.
- There is a real difference between works which the landlord is obliged to carry out and work which is an optional improvement on the other.
- Spectrum of different factual situations

TANFIELD

Waaler (8)

- 3 factors:

  (1) extent of lessees' interest
  (2) views of the tenants
  (3) financial impact of the works.

- Not obliged to investigate means of individual tenants;

- The landlord is likely to know what kinds of people are lessees in a particular block or estate.

- Lessees of flats in a luxury block of flats in Knightsbridge may find it easier to cope with a bill for £50,000 than lessees of former council flats in Isleworth

Mixed Reasons: *No 1 West India Quay*

***No 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2018] HLR 20**

L refused consent to assignment unless T agreed:

- to pay £1,600 for each flat
- to allow L's surveyor to inspect each flat to make sure no breaches of lease
- to provide a bank reference for the proposed assignee

TANFIELD

No 1 West India Quay (2)

Landlord and Tenant Act 1988

Section 1

(3) Where there is served … a written applicaiton by the tenant for consent to the transaction, he owes a duty to the tenant within a reasonable time –

(a) to give consent, except in a case where it is reasonable not to give consent

TANFIELD

No 1 West India Quay (3)

BRS Northern Ltd v Templeheights Ltd [1998] 2 EGLR 182

"[W]here, as here, a refusal of consent to an assignment is based on a number of reasons, the fact that one of those reasons is bad will not normally render the refusal unreasonable, assuming the other reasons are good … it is a question of considering the covenant and the refusal of consent in each case. Thus, it may be clear that the bad reason is by far the most important reason, and that the purportedly good reasons were merely makeweights; or it may be that the existence of the bad reason infects or vitiates what would otherwise, in the absence of the bad reason, be a good reason."

Neuberger J at 193

TANFIELD

No 1 West India Quay (4)

> *"To describe one reason as having "infected" another implies, at the least, some connection between them. If the good reasons are freestanding, and not dependent on the bad reason, it would seem on the face of it that there has been no infection of the good by the bad"*
>
> Lewison LJ *at* [35]

- notice under s.146 alleging multiple breaches of covenant
- a mortgagee's exercise of power of sale

TANFIELD

No 1 West India Quay (5)

R v Broadcasting Commission Ex P Owen [1985] QB 1153

"Where the reasons given by a statutory body for taking or not taking a particular course of action are not mixed and can clearly be disentangled, but where the court is quite satisfied that even though one reason may be bad in law, nevertheless the statutory body would have reached precisely the same decision on the other valid reasons, then this court will not interfere by way of judicial review. In such a case, looked at realistically and with justice, such a decision of such a body ought not to be disturbed."

May LJ at 1177

TANFIELD

No 1 West India Quay (6)

- If a reason is merely a makeweight then absent that makeweight the decision cannot have been caused by that reason.

- If the decision would have been the same without reliance on the bad reason, then the decision (looked at overall) is good. In that situation the bad reason will not have vitiated or infected the good one.

TANFIELD

No 1 West India Quay (7)

"The question was not: would the landlord have maintained the unreasonable reason if the reasonable conditions had been complied with? Rather it is: would the landlord still have refused consent on the reasonable grounds, if it had not put forward the unreasonable ground? To put the point another way: the question is whether the decision to refuse consent was reasonable; not whether all the reasons for the decision were reasonable. Where, as here, the reasons were free-standing reasons each of which had a causative effect, and two of there were reasonable, I consider the decision itself was reasonable."

Lewison LJ at [42]

TANFIELD

A duty to give reasons?

***Price v Bouch* (1986) 53 P&CR 257 (Ch.D.)**

1895 Deed: "No dwelling houses or other building shall be erected unless the plans have first been submitted to and approved by a majority of such committee"

Did the committee have to give reasons for their refusal to give approval of plans?

TANFIELD

A duty to give reasons? (2)

"The committee are a domestic body with a general discretion to exercise and no clearly defined issue to determine. In any given case there may be several reasons which lead different members of the committee to the same conclusion. The majority of the committee may not all agree for the same reasons, and no single reason may command majority support. If the committee were bound to give reasons, they would in practice have two decisions to make, first whether to grant or refuse approval, and secondly, what reasons to give; and they would be well advised to take legal advice before making the second decision.

It may be appropriate, and will normally be convenient, for the committee to give reasons for their decision, if only because a failure to give any reason at all may lead to the inference that there is no good reason to give"

Millett J at p 262

TANFIELD

A duty to give reasons? (3)

***R (Oakley) v South Cambridgeshire District Council* [2017] 1 WLR 3765**

"In view of this, it may be more accurate to say that the common law is moving to the position whilst there is no universal obligation to give reasons in all circumstances, in general they should be given unless there is a proper justification for not doing so."

Elias LJ at [30]

- Affirmed by the Supreme Court in ***R (CPRE Kent) v Dover District Council*** [2018] 1 WLR 108 (SC)

- If private law develops alongside public law, is ***Price v Bouch*** still correct?

TANFIELD

Other examples

***Lymington Marina Limited v Macnamara* [2007] EWCA Civ 151**

Refusal of consent to a sub-licence of a mooring berth in a marina.

"[T]here has to be implied a term that the power to withhold approval should be exercised in good faith and that the approval will not be withheld arbitrarily. This is because the parties clearly intended that the holder of the licence should have power to grant sub licences under clause 3(k)(ii), subject only to the withholding of approval to the proposed sub licensee. It is obvious that if the licence holder is to obtain the proper benefit of that clause LML should not be in a position to withhold its approval in bad faith or capriciously. Nothing further than this is required for the business efficacy of the licence."

Arden LJ at [44]

TANFIELD

Other examples (2)

Paragon Finance v Nash [2002] 1 WLR 685

Implied term limiting a mortgagee's power to set interest rates under a variable rate mortgage.

> *"It is one thing to imply a term that a lender will not exercise his discretion in a way that no reasonable lender, acting reasonably, would do. It is unlikely that a lender who was acting in that way would not also be acting either dishonestly, for an improper purpose, capriciously or arbitrarily. It is quite another matter to imply a term that the lender would not impose unreasonable rates*"
>
> Dyson LJ at [41]

TANFIELD

Vinnie (1): *Wednesbury* again

***Victory Place Management Co Ltd v Kuhn* [2018] HLR 26**

Lease Covenant: "No dog, bird, cat or other animal or reptile shall be kept in the [Property] without the written consent of [VPMC]"

Did both limbs of *Wednesbury* apply?

"*[M]y inclination would have been to hold … that both the "process" limb of the Wednesbury test and the "outcome" limb would have been applicable … the Covenant was expressed to be for the benefit of the other lessees as well as VPMC. The implication must obviously be that the management company should behave reasonably in considering whether or not to grant consent. Reasonableness in that context involves both a reasonable process and a rational outcome. But in the context of a Lease such as this, these are not high thresholds to meet. The negative formulation of the Covenant is relevant since it creates a presumption that pets are not allowed unless written consent is granted*."

Sir Geoffrey Vos (Chancellor) at [33]

TANFIELD

Vinnie (2): Policies

- Is it lawful to have a policy?

- Unlawful predetermined outcome due to inflexible policy v legitimate predisposition to a particular view - ***Bovis Homes Ltd v New Forest DC*** [2002] EWHC 3483 (Admin)
- *" …a Council acts unlawfully where its decision-making body has predetermined the outcome of the consideration which it is obliged to give to a matter, whether by the delegation of its decision to another body, or by the adoption of an inflexible policy, or as in effect is allged here, by the closing of its mind to the consideration and weighing of the relevant factors because of a decision already reached or because of a determination to reach a particular decision. It is seen in a corporate determination to adhere to a particular view, regardless of the relevant factors or how they could be weighed. It is to be distinguished from a legitimate predisposition towards a particular point of view."*

Ouseley J at [111]

TANFIELD

Vinnie (3): Policies

" I do not think the policy that requests would be refused save in special or exceptional circumstances was either unreasonable or irrational. It would be possible to argue that a different, more liberal, policy might be equally consistent with a Covenant framed in this negative way. But that is not really the point. The implied term is only to operate a reasonable process in considering requests. It is quite reasonable, in considering requests, to take into account the policy set by a majority of lessees as members of VPMC that dogs would not be permitted save in special circumstances."

Sir Geoffrey Vos (Chancellor) at [40]

TANFIELD

Conclusions

- Public law style principles are well settled as implied terms.
- As with public law, matters are still developing
- The extent of any term will always depend on the contract
- Duty to give reasons is likely to follow the public law.
- Degree of scrutiny of a decision is likely to be an issue
- Break notices?
- Notices to quit?
- What are the consequences of an irrational decision?

TANFIELD

Barking Up The Right Tree

Irrationality, unreasonableness and consent in property contracts

Christopher Heather Q.C.

TANFIELD