IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Neutral Citation Number: [2020] EWHC 616 (QB)

Case No: QA/2019/000202

Friday, 17th January 2020

Before:
THE HONOURABLE MRS JUSTICE TIPPLES DBE

B E T W E E N:

(1) KWIK LETS LIMITED
(2) BARON DESCHAUER
(3) SHOSHANA GILBERT

Appellants

and

AMANPREET SING KHAIRA & OTHERS

Respondent

MR I QUIRK instructed by Fox Williams LLP appeared on behalf of the Appellants

MR O ASSERSOHN instructed by Kleyman & Co appeared on behalf of the Respondent

JUDGMENT
(Approved)

MRS JUSTICE TIPPLES:

1. This is an appeal against a decision of Senior Master Fontaine on 26 April 2019 dismissing, in part, an application by four defendants that the claim against them be struck out, alternatively that summary judgment be given in their favour. The appeal is pursued by three of the defendants, namely the third, fourth and seventh defendants (Kwik Lets Limited, Baron Deschauer and Shoshana Gilbert). The sixth defendant, Marcus Grubb, has dropped out of the picture and is not participating in an appeal.

2. In this judgment I shall refer to the third, fourth and seventh defendants collectively as "**the appellants**". The appellants were represented by Mr Ian Quirk who did not appear before the Senior Master. The appellants maintain that the Senior Master was wrong to dismiss part of their application and say that the Senior Master should have granted all the relief they were seeking. I also have before me a cross appeal made out of time by the respondents to this appeal in which, in essence, they say the Senior Master was wrong to grant any relief at all on the appellants' application, and it should have been dismissed in its entirety.

3. The essential issue before the Senior Master was whether there was any basis to imply a term into a contract pursuant to a so-called "Braganza duty", based on the decision of the Supreme Court in *Braganza v BP Shipping* [2015] 1 WLR 1661, [2015] UK SC 17.

4. I first of all need to explain the background to the dispute before turning to what happened before the Senior Master.

5. By a settlement agreement dated 7 August 2012, seven sets of proceedings in the Chancery Division of the High Court were compromised. The underlying dispute concerned the sale and purchase of land, which included allegations of fraud and dishonesty. The claimants and the defendants to this action were, as I understand it, all parties to the settlement agreement, which I shall refer to as "**the settlement agreement**" in this judgment. The background is that the disputes had arisen regarding the purchase of plots of land by the claimants who comprised 39 individuals and are the respondents to this appeal. The respondents were represented by Mr Assersohn who also appeared before the Senior Master. I should say at the outset that I was grateful to both counsel for their detailed oral and written arguments in relation to this appeal which, as we shall see, included reference to some authorities which were not before the Senior Master.

6. The disputes I have just mentioned were contained in seven sets of proceedings which were compromised under the settlement agreement on terms pursuant to which the plots of land sold to the respondents (referred to as the "Plot Owners" in the agreement) were repurchased by four incorporated parties to the agreement referred to as the "Land Companies". The Land Companies were the thirtieth to thirty-third parties to a settlement agreement and were called Bluebell Land Limited, Groombridge Grove Limited, Lakeview Developments Limited and Collingham Land Limited. Bluebell Land Limited and Lakeview Developments Limited are the first and second defendants to this action. Under the settlement agreement the respondents were to be paid the aggregate sums of £1.5 million which was payable by instalments. The appellants, Kwik Lets Limited, Baron Deschauer and Shoshana Gilbert are defendants to the claim. However, under the

settlement agreement they are under no obligation to pay any part of the £1.5 million to the respondents and that is common ground between the parties. As to the other terms of the settlement agreement, there was a confidentiality provision at clause 5 which provided, amongst other things, that the facts giving rise to the proceedings, the settlement and the settlement agreement and its terms were to be held in complete confidence by each of the parties to the settlement agreement, and could not be disclosed to any other person except in certain limited circumstances.

7. Clause 6.2 included a warranty that each party:

> "Has had the opportunity to take legal advice as to the wisdom of entry into and the terms of this agreement (and specifically that it compromises claims in fraud for dishonesty and claims of which he/she/it may not be aware) and has taken all necessary action to authorise its entry into the performance of the settlement agreement."

8. The fact that each party has had the opportunity to take legal advice is also recorded at clause 6.4 of the settlement agreement. Clause 6.5 then provides as follows, and this is the crucial clause for the purposes of the appellants' application and this appeal:

> "6.5 In this Clause 6.5 the expressions Plot Owners and Land Companies shall include all or any of them and expression Land Companies shall include MG, SG, BD, CPL and KLL or such of them as may suffer loss by reason of the breach of this agreement by all or any of the Plot Owners.
>
> 6.5.1 In the event of any act or omission by the Plot Owners which the Land Companies consider to be a breach of this Settlement Agreement, the Land Companies may, in addition to all other rights and remedies under this Settlement Agreement or otherwise, suspend the payment of instalments under Clause 2 provided the Land Companies have first given notice of the act or omission that contended to amount to a breach.
>
> 6.5.2. The Plot Owners may give notice disputing the acts or omissions or that they constitute a breach.
>
> 6.5.3 The Plot Owners may commence proceedings challenging the suspension of payments by commencing proceedings for one or more instalments which have not been paid by reason of such suspension and they do so whether or not they have given notice.
>
> 6.5.4. The Plot Owners and the Land Companies agree to abide by the final and binding decision of any court for a confident jurisdiction and to do all things necessary to implement such a decision."

9. The reference to KLL, BD and SG in clause 6.5 is to the appellants who were therefore included within the definition of Land Companies for the purposes of clause 6.5 (but not otherwise).

10. On 9 May 2014, the Land Companies gave notice under clause 6.5.1 of a breach of a confidentiality provision of the settlement agreement and that payments of instalments were suspended in accordance with that clause. In particular, the notice said: "the Land Companies further give notice under clause 6.5.1 of the settlement agreement that they hereby suspend payment of the instalments under clause 2 of the settlement agreement,

alternatively, that they will do so the day of the service of this notice."

11. In response, the respondents gave notice under clause 6.5.2 of the settlement agreement and in due course these proceedings were commenced as provided for in clause 6.5.3 of the settlement agreement. The proceedings were issued on 12 March 2018 originally by a part 8 claim form but were subsequently converted into part 7 proceedings by the order of Master Gidden dated 27 June 2018. The particulars of claim dated 6 July 2018 set out the relevant background which I have summarised above, together with the material parts of the settlement agreement, including clause 6.5 in full, and then at paragraph 9 of the particulars of claim the following is alleged:

> "9. The following terms were necessarily implied into the Settlement Agreement to give it business efficacy and to reflect the true intention of the parties;
>
> 9.1 There must be reasonable grounds for either party to serve a notice under the Settlement Agreement; and
>
> 9.2 Such a Notice must be accompanied by sufficient evidence that the alleged breach had occurred or, alternatively that the Party serving notice must have had sight of sufficient evidence to justify serving of the Notice."

12. There is no other allegation at paragraph 9 or elsewhere in the particulars of claim identifying the basis on which such term is to be implied into the settlement agreement. Clause 9 explains the basis of implication of the terms on the footing that they are to be "necessarily implied" for "business efficacy" and "to reflect the true intention of the parties". However, why that is so is not explained in the particulars of claim.

13. The other point to note here on the pleading is the way that paragraph 9.1 is pleaded is not for a *Wednesbury* unreasonableness clause, but for a straight contractual obligation that there must be (objective) reasonable grounds for serving a notice under clause 6.5.1. I mention this because in *Socimer International Bank Limited v Standard Bank London Limited* [2008] EWCA Civ 116 it was made clear that, even in those cases where a *Braganza* type duty arises, it is limited to the *Wednesbury* basis (i.e. not arbitrary, capricious or irrational). It does not import an objective test of requiring "reasonable grounds" (see paragraph [66]).

14. Then at paragraph 10 of the particulars of claim the allegations of breach of contract are set out:

> "10. In breach of the express and implied terms of the Settlement Agreement set out at paragraphs 8 and 9 above, in May 2014 the Defendants served the Notice on the Claimants without any or any reasonable grounds and subsequently ceased paying monthly instalments."

15. Pausing there, it is common ground that the appellants are not in breach of the express terms of the contract relating to the payment of instalments. This means that paragraph 10.1 of the particulars of claim does not apply to them. The only allegations which are relevant are those concerning the alleged breach of the implied terms which are as follows:

> "10.2 In serving the Notice without any or any sufficient evidence of a breach occurring, the Defendants have breached the implied term to that effect

under the Agreement….

10.3 The Defendants had no reasonable grounds to serve the Notice, and since the service of the Notice they have not provided any basis for justification for serving the same.

10.4 The Defendants purported to provide sufficient evidence at the time that the Notice was served in the form of a screenshot of the Forum where the Settlement Agreement had been mentioned….

10.5 Affidavits by the Claimants had previously been provided to the Defendants confirming that no member of the Group breached the Agreement, to which the Defendants did not reply."

16. Paragraph 13 of the particulars of claim makes a claim for loss and damage, which is then reflected in paragraphs 1 and 2 of the prayer for relief, and relates to the failure to pay instalments and interest thereon to the respondents. That claim does not concern the appellants. The only claim in the prayer for relief which concerns the appellants is paragraph 3 which seeks a declaration that the notice served by the Land Companies on 9 May 2014 is defective because the defendants – which includes the appellants – had no reasonable grounds for serving it.

17. The defence was served on 31 August 2018 and in the defence any breach of the settlement agreement was denied. Further, in relation to the allegations that the settlement agreement included the implied terms, the respondents denied there was any basis for them and, in particular, made the point that the settlement agreement had been drafted by lawyers, the terms would contradict and be inconsistent with the express terms of the contract, particularly at paragraph 6.5.1.

18. It was only when the reply was served that the basis for the implied term set out at paragraph 9 in the particulars of claim was clarified. Paragraph 14 of the reply says this, so far as relevant:

"14. The Particulars of Claim averred that the terms were implied to give the Settlement Agreement business efficacy and to reflect the true intentions of the parties (i.e. obviousness). The Defence does not plead at all in respect of the latter ground for implication. As to paragraph 9, the Claimants aver:

14.1 The implication to exercise a contractual discretion reasonably in public law "reasonableness" sense is well established (i.e. exercise a discretion which is not arbitrary, capricious or irrational in a public law sense);

14.2 Clause 6.5 of the Settlement Agreement gave rise to a potential conflict between the Land Companies in considering whether or not a breach had occurred, and if so, whether payment should be suspended. The potential for conflict arose because it was in the Land Companies' immediate financial interests to cease payment to the Plot Owners (and this is what they did);

14.3 In order to fulfil the duties identified at paragraph 9 of the Particulars of Claim the Plot Owners were under a duty to conduct the determination as to whether or not there was a breach of a Settlement Agreement in a way which was not arbitrary, capricious or irrational including:

14.3.1 Following a proper process in determining whether or not there is a breach of the Settlement Agreement and this included taking into account material points and not taking into account irrelevant considerations; and,

14.3.2 Not reaching an outcome which is outside what any reasonable decision-maker could make, regardless of the procedure adopted."

19. I do not need to set out any more from paragraph 14 of the reply.

20. It seems to me that these allegations should have been set out in the particulars of claim. However, no issue on that was raised before the Senior Master and, given this appeal gives rise to a point of law, it is not useful for me to say any more about that.

21. The appellants then served the request for further information which, in essence, was to pin the respondents down as to the limited nature of the relief sought against them.

22. On 9 November 2018 the appellants issued their application for the striking out of the claim against them, alternatively summary judgment under CPR part 24. That application was supported by the witness statement of Peter Ronald Ashford. The respondents served evidence in answer which was contained in the evidence of Frederick Thomas Kenyon Shutes dated 28 January 2019. The application was heard at a three-hour appointment before Senior Master Fontaine on 19 February 2019 and judgment was handed down on 26 April 2019.

23. In her detailed judgment the Senior Master set out the relevant case law in relation to implied terms and, in particular, cases relating to the exercise of a contractual discretion, including at paragraph 18 of Lady Hale's judgment in *Braganza*; reference to the judgment of Jackson LJ in *Mid-Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd* [2013] EWCA Civ 200; and two recent decisions of His Honour Judge Waksman QC (as he then was) in *Shurbanova v Forex Capital Markets Limited* [2017] EWHC 2133 (QB) and *Watson v Watchfinder.co.uk Limited* [2017] EWHC 1275. The *Shurbanova v Forex* case was an authority that the respondents placed particular reliance on before the Senior Master.

24. The Senior Master analysed clause 6.5.1 of the settlement agreement by reference to the case law and, having done so, concluded that the respondents' case that the term alleged at paragraph 9.1 of the particulars of claim (which she referred to as the first implied term) should be implied had a real prospect of success and therefore got over the standard required by CPR part 24. Her reasons are set out at paragraphs [46]-[50] of her judgment. At paragraph [46] she said this:

> "[46.] I consider that there is a real prospect of success in the claimants' case that the first implied term satisfied Lord Simon's tests [which is a reference to *BP Refinery (Westernport) Pty Ltd v President, councillors and Ratepayers of the Sire of Hastings* (1977) 52 ALJR 20 and what was said by Lord Simon of Glaisdale at p. 26 in relation to the five conditions which must be satisfied for a term to be implied]. It is properly arguable that it is fair and equitable, that it is obvious, and that it is necessary to give business efficacy, so that potentially drawn out proceedings are not embarked on unless there are objective grounds on which to consider that there has been a breach of the Settlement Agreement. The implied term is capable of clear expression. As to whether it contradicts and express clause of contract, namely that it would imply an objective standard into an expressly subjective clause, the decisions in *Mid Essex* and *Braganza* are relevant."

25. The Senior Master then explained why she considered the *Mid Essex* case should be distinguished and then at paragraph [49] she said this:

> "[49.] In this case both parties had the benefit of professional advice during the negotiations and drafting the Settlement Agreement, so any imbalance of power is not so clear as in *Braganza*. The claimants and all individuals who invested in plots sub-divided from a larger parcel of land, the Land Companies were a mixture of companies and individuals. But it is in my view reasonably arguable, to a Part 24 standard, that there was an imbalance of power between the parties to the Settlement Agreement…"

26. At paragraph [50] the Senior Master concluded by saying:

> "[50] I therefore consider that it is arguable, to a Part 24 standard, that the first implied term was applied onto the contract."

27. However, the Senior Master concluded that the claimants or respondents had no real prospect of success in respect of their allegation that the term alleged at paragraph 9.2 of the particulars of claim (which she referred to as the second implied term) should be implied.

28. As a result of these conclusions it was ordered that the application be dismissed and that the claim continue against the appellants save that paragraph 9.2 of the particulars of claim and paragraph 15 of the reply be struck out. It is that order that the appellants now appeal. The applications consequential on the Senior Master's decision were then adjourned to a CCMC, which took place on 7 June 2019. The Senior Master refused the appellants permission to appeal and the respondents did not seek to challenge her decision that the second implied term be struck out.

29. On 21 October 2019 Stewart J granted the appellants permission to appeal. A respondents' notice was served in time on 7 November 2019 but on 21 November 2019 a revised respondents' notice was served together with a cross appeal in relation to the Senior Master's decision on the second implied term. The respondents seek an extension of time in order to rely on those documents, together with relief from sanctions. The evidence provided in the further witness statement from Mr Shutes states that the reason these documents were filed 14 days out of time was because,: "Counsel did not have availability to review the appeal and instructing solicitors (Kleyman and Co. solicitors) did not have instructions or funds on account for the appeal. These were anticipated by 7 November 2019, but were not confirmed." I will deal later in this judgment with that application.

30. There are two grounds of appeal. Ground 1 is as follows:

> "The Master erred in law in finding that there was a real prospect of success that a *Braganza* discretionary duty, i.e. a duty not to exercise a contractual discretion in an arbitrary, capricious or irrational manner, was to be implied in relation to Clause 6.5.1 of the Settlement Agreement dated 7 August 2012. Clause 6.5.1 provided for a binary choice for the Land Companies (which included the appellants for the purposes of that clause only) to suspend payment by reason of an alleged breach, or not to do so. A *Braganza* type duty is completely inapposite to such a right."

31. Ground 2 is:

> "The Master erred in fact and/or law in holding there was a real prospect of success that there was an imbalance of power between the parties to the Settlement Agreement and that there was a conflict of interest as the suspension of payments would benefit the Land Companies such that a *Braganza* type duty arose…"

32. I do not need to read the rest of Ground 2.

33. The respondents' notice seeks to uphold the Senior Master's decision for the reasons she gave and also relies on the contents of their *Jolly v Jay* letter to the court dated 31 July 2019.

34. Before turning to the argument before me I should just say something about (i) the relevant law and procedure, (ii) the points not in dispute between the parties, and (iii) the key issues on this appeal.

35. First, I can only allow the appeal if I am satisfied that the decision of Senior Master Fontaine was wrong: CPR part 52.21(3)(a).

36. Second, there are no factual issues in dispute between the parties which are relevant to the appellants' application. Likewise, it is not suggested that any more evidence would be available to the court at a trial than is already available on this application. Rather, the central question the court was asked to determine on the appellant's application was a question of law.

37. Third, it is well established under CPR part 24 that, where a summary judgment application gives rise to a short point of law and construction, the court should decide that point if it has before it all the evidence necessary for a proper determination and it is satisfied that the parties have had an adequate opportunity to address the points in argument (*Civil Procedure* (Vol 1), paragraph 24.2.3).

38. Fourth, the relevant law and criteria in relation to the implication of a term is the decision of the Supreme Court in *Marks & Spencer's Plc v BNP Paribis Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72 and, in particular, the judgment of Lord Neuberger at paragraphs [14]-[32], and particularly at paragraph [21]. I do not propose to cite from that judgment as those passages are now well known and there is no issue between the parties in relation to them.

39. Fifth, the settlement agreement is a contract containing a commercial agreement between the parties which was entered into with the benefit of legal advice, or the opportunity to take such legal advice.

40. Sixth, the central issue on this appeal is what relevance, if any, paragraphs [18] and [19] of Lady Hale's judgment in *Braganza* – which gives rise to the so-called *Braganza* duty – has to the settlement agreement and, in particular, clause 6.5 and whether it provides any foundation to imply the term alleged at paragraph 9.1 in the particulars of claim namely that "that there must be reasonable grounds for either party to serve a notice under the settlement agreement".

41. Seventh, the only basis on which the respondents seek to imply the alleged term into the

settlement agreement is in the light of the decision in *Braganza*. Indeed, unless the respondents are able to do so, it is worth remembering what was said by Reid LJ in *White & Carter (Councils) Limited v McGregor* [1963] AC 413 at page 430: "It has never been the law that a person is only entitled to enforce his contractual rights in a reasonable way, and that a court will not support an attempt to enforce them in an unreasonable way…".

42. Eighth, the crucial passages of the *Braganza* decision are at paragraphs [18] and [19] of Lady Hale's judgment. Mr Braganza was an engineer on an oil tanker and he disappeared at sea. No-one was certain what had happened. His employers formed the opinion that the most likely explanation for his disappearance was that he committed suicide by throwing himself overboard. This meant that, under the relevant provision of contract the employers having formed that opinion, Mr Braganza's widow was not entitled to the death benefits under his contract of employment. The task of the court was not to decide what had happened to Mr Braganza, but to decide whether the employer was entitled to form the opinion which it did and the Supreme Court identified as a matter of general principle the test be applied by the court in deciding the question. At paragraphs [18] and [19] of her judgment Lady Hale explained.

> "[18.] 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. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there will often 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.
>
> [19.] 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 court 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."

43. Further, at paragraph [32] Lady Hale observed that the particular context of the case was an employment contract which is of a different character from ordinary commercial contracts. Lord Hodge and Lord Kerr agreed with Lady Hale that the appeal should be allowed. Lord Neuberger, with whom Lord Wilson agreed, agreed that the court's approach should therefore be similar to that of an appellate court reviewing the trial judge's decision, but dissented on the outcome on the facts of the case.

44. Ninth, central to identifying whether a *Braganza* duty should be implied into a contract in any case is whether, in any particular situation, the parties have agreed that one party should be a primary decision-maker in respect of a decision that affects both parties. The decision

in question may concern the power to exercise the discretion or to form an opinion as to relevant facts. However, as I have mentioned, the decision in question must affect the rights of both parties. Indeed, and in the *Shurbanova v Forex Capital* case, HHJ Waksman QC said:

> "[93] … a discretion of the *Braganza* type which is concerned with a determination of a substantive matter, or a judgment about or evaluation of some state of affairs which one party makes as the decision-maker, but which affects the interests of both, hence giving rise to a potential conflict of interest. See for example paragraphs 18-22 in the judgment of Lady Hale in *Braganza*. The need to find a "target" for the determination in question … supports this. It is meaningless to talk of FX's determination of his consequential or secondary contractual powers including revocation (arising in fact by reason of defined contractual wrong on the part of Mrs Shurbanova) as a discretion of the relevant kind. If it were otherwise, then it could be said that a party's choice as to whether or not to rescind a contract for misrepresentation as opposed to seeking damages (one of which may be very much more of the advantage financially of the party in default) was itself a contractual discretion always subject to a *Braganza* duty. That cannot be right."

45. I should add here that there is no real dispute between the parties on this appeal as to the relevant legal principles. Rather, the issue between them is how they apply to the settlement agreement and in particular to clause 6.5.

46. Tenth, there is a very helpful discussion of the contractual discretion cases in *Monk v Largo Foods Limited* [2016] EWHC 1837 (Comm), a decision of Mr David Foxton QC, sitting as Deputy High Court Judge. The copy I have in the authorities bundle is, I am told by Foxton J, the approved judgment as set out on page 1 of the document, although every page thereafter is marked "unapproved judgment". I am therefore satisfied that I do have the approved version of this judgment in the documents before me. Unfortunately, this decision was not shown to the Senior Master. For present purposes, the relevant paragraphs are between paragraphs [52] and [60]. At paragraphs [54] to [58] the Deputy Judge said this under the heading "Termination clauses":

> "[54.] However, it is not every decision which a party to a contract makes which can properly be characterised as a contractual discretion and to which the principles identified in *Socimer* and *Braganza* apply. Where, for example, a commercial contract gives one party a right to terminate in certain circumstances, it will not ordinarily be appropriate to subject the exercise of that right to obligations of procedural or substantive fairness akin to the public law duties which apply to the decisions of the executive. In *Lomas & Ors v JFB Firth Rixson* [2012] EWCA Civ 419 at [46], the Court of Appeal noted:
>
> > "the right to terminate is no more an exercise of a discretion, which is not to be exercised in an arbitrary or capricious (or perhaps unreasonable) manner, than the right to accept repudiatory conduct as a repudiation of a contract".
>
> [55.] At first instance ([2010] EWHC 3372 (Ch), Briggs J had reached the same conclusion by a different route, noting the right to terminate was "plainly to be exercised in such a way as the Non-defaulting Party considered best served its own interests, by way of a choice between alternative remedies arising out of its counterparty's default" (at [93]).

> [56.] In *Mid-Essex Hospital Services NHS Trust v Compass Group UK and Ireland* [2013] EWCA Civ. 200 at [83], Jackson LJ noted of the contractual discretion cases that:
>
> > "[a]n important feature of the … authorities is that in each case the discretion does not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options taking into account the interests of both parties.
>
> [57.] Similarly, where a commercial contract gives one party an option to extend the contract, or as to the amount of goods to be supplied or acquired, or as to the ports or berths to or from which cargo is to be shipped, that party will not ordinarily be under any duties of the kind recognised in *Braganza* in relation to the exercise of that option."

47. The Deputy Judge then referred to, and doubted, the decision of Leggatt LJ (as he then was) in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm) (which was subsequently overturned on appeal).

48. I now turn to the parties' arguments on this appeal.

49. In relation to the first ground of appeal the appellants say, first, that the *Braganza* duty is completely inappropriate for a provision which provides for a remedy for the alleged breach (whether by way of termination or suspension of payment). They rely on *Monk v Largo Foods Limited* at paragraphs [54] and [57] which, as I have said, was not cited to the Senior Master. They say that a right to terminate or suspend payment (or exercise any other remedy) by reason of an alleged breach is self-evidently to be exercised by that party for its own interests. The appellants also rely on *Lomas v JFB Firth Rixson* [2010] EWHC 3372 a decision of Briggs J (as he then was), at paragraph [93] and the decision of the Court of Appeal in the same case which is reported at [2012] EWCA Civ 419 at paragraph [46]. Neither of those decisions in *Lomas* were shown to the Senior Master by the appellants. The appellants say that the Land Companies had an absolute right under clause 6.5.1 to decide whether to give notice and suspend instalments if they considered there to have been a breach, solely by reference to their own interests. They say it is not a right which is subject to a public law type of duty of fairness.

50. Secondly the appellants say that clause 6.5.1 is not a contractual discretion. It is not an assessment of a range of options taking into account interest of both parties, rather it was a binary choice to suspend payment or not to do so and a *Braganza* duty does not apply to such a right: see the *Mid-Essex Hospital* case. They say the Senior Master's conclusion in this regard at paragraph [38] of her judgment is correct.

51. The appellants also criticised other aspects of the Senior Master's judgment, but the arguments I have just identified were their main points.

52. The respondents, in response, focus on the words "or to form an opinion as to the relevant facts" at paragraph [18] of Lady Hale's judgment in *Braganza* and rely, in particular, on the authorities of *Shurbanova v Forex, Watson v Watchfinder* and *BHL v Leumi* [2017] EWHC 1871 (QB). They say, as they argued before the Senior Master, and applying the approach of the courts to the *Braganza* duty that, first, forming an opinion and electing to take action

based on that opinion constitutes a discretionary power and is analogous to the situation in the *Shurbanova v Forex* case where the assessment was subjective (i.e. the Land Companies consideration) and not objective (see also *Watchfinder*). That was their first argument.

53. Second, clause 6.5 of the settlement agreement gives rise to a potential conflict for the Land Companies in considering whether or not a breach had occurred and if so, whether payment should be suspended (see the cases discussed above). The potential for conflict arose because it was the paying Land Companies' immediate financial interest to cease payment to the Plot Owners (and this is what they did).

54. Third, the respondents say that, and I quote from Mr Assersohn's skeleton argument at paragraph 15(c):

> "On Ds' case, notice could be given not just without reasons being provided but also without Ds having a rational basis for doing so which would give rise to an obvious risk of abuse (see *BHL v Leumi*) and ignore the approach of the courts in the *Shurbanova* and *Watchfinder* cases. It is submitted that accepting Ds' analysis would lead to a contractual absurdity because payment would – on Ds' analysis – be subject to any of Ds' irrational whim."

55. Fourth, the respondents' argument advanced set out at paragraph 15(d) of Mr Assersohn's skeleton argument is that:

> "In order to fulfil the duties identified at [paragraph] 9 of the particulars of claim and reply, Ds were under a duty to conduct the determination as to whether or not there was a breach of the Settlement Agreement in a way which was not arbitrary, precious or irrational. The fulfilment of the *Braganza* duty entails a proper process for the decision in question taking into account the material points and not taking into account irrelevant considerations and would also entail not reaching an outcome which was outside what any reasonable decisionmaker would decide."

56. Having recited the respondents' arguments, it is important to remember the term which the respondents say should be implied is simply: "there must be reasonable grounds for either party to serve a notice under the settlement agreement." That term only relates to the service of notices under the settlement agreement. It does not, for example, relate to any other contractual discretions which the parties are entitled to exercise under the settlement agreement. I mention that because one point that puzzled me at the hearing was Mr Assersohn's reference to the Land Companies' decision under clause 6.5.1 to suspend the payment of instalments to the respondents under clause 2. Clause 6.5.1 of the settlement agreement provides that such a decision cannot be taken by the Land Companies unless, or provided that, the Land Companies have first given notice with the act or omission that contended to amount to the breach. The alleged implied term relates to the prior step, namely the service of the notice, but does not relate to the reasonableness or otherwise of the Land Companies' decision to suspend the payment of instalments once that notice has been served. However, as against that, the service of the notice by the Land Owners identifying the breach obviously provides a backdrop against which they can decide to suspend the payment of instalments, and the existence of that notice is therefore critical to whether such a decision to suspend payments can be made. Nevertheless, there is no pleaded case of an implied term that action the Land Owners elect or decide to take, having served the notice under clause 6.5.1, has to be reasonable or is subject to a *Braganza* type

duty. This, it seems to me, to be important because the focus on this appeal is whether there is any legal basis to imply the term set out in paragraph 9.1 of the particulars of claim into the settlement agreement.

57. Returning to clause 6.5 it seems to me the following points are relevant:

(1) The clause applies to an extended definition of Land Companies, which includes the appellants. There is no dispute about that. In this context under clause 6.5 the Land Companies therefore includes the appellants.

(2) The Land Companies are entitled to serve notice on the Plot Owners identifying any act or omission by the Plot Owners which they contend to be a breach of the settlement agreement. That is clause 6.5.1.

(3) Only when such a notice has been served can the Land Owners decide to suspend payments. Again, that is clause 6.5.1.

(4) The Plot Owners can dispute the contents of the notice by serving a counter-notice. That is clause 6.5.2.

(5) The Plot Owners can commence proceedings challenging the suspension of payments. That is clause 6.5.3. It seems to me that it is inevitable that any such proceedings would involve consideration as to the validity of the contents of the notice served by the Land Companies - and indeed that is the position in this case.

(6) Clause 6.5.4 provides that the Plot Owners and the Land Companies agree to abide by the final and binding decision of any court of competent jurisdiction and to do all things necessary to implement such a decision. Therefore, one party cannot decide whether the notice of the act or omission contended to amount to a breach is valid, or indeed whether a decision to suspend payment of instalments under clause 2 of the settlement agreement was permanent or not. Rather, these are decisions for the court. Indeed, if the court were to determine that the Plot Owners were not in breach of the settlement agreement and therefore there was no basis for the Land Companies to serve notice alleging breach, and as a consequence to suspend payments, then the Land Companies, which includes the appellants, have agreed to do all things necessary to implement such a decision which includes paying all outstanding instalments under the settlement agreement together with, no doubt, interest thereon. Further, the Plot Owners and the Land Companies, including the appellants, agree to abide by the final and binding decision of any court.

58. It therefore seems to me that, whilst it is true that the Land Companies (which I have explained include the appellants in this context) may be said to exercise a discretion, or form an opinion of relevant facts. under clause 6.5.1 in relation to the notice of acts or omissions contended to be a breach of the settlement agreement, I do not see how, in this context, the Land Companies can be described as the contractually agreed decision-maker charged with making a decision that affects the rights of both parties. This is because clause 6.5 sets out very clear machinery providing that the court is the decision-maker in respect of whether the Land Companies are entitled to suspend payments of the instalments under clause 2, having first served notice contending that there has been a breach of the settlement agreement.

59. If there has been a breach of the settlement agreement, the Land Companies are entitled to decide whether to serve a notice on the Plot Owners contending there has been a breach, whether by an act or omission of the settlement agreement. However, this is not a situation where there is a range of options open to the Land Companies and the appellants. Indeed, there is no dispute that the learned Senior Master was correct at paragraphs [38] and [39] of her judgment when she said this:

> "[38.] There is no range of options available to the Land Companies at clause 6.5.1. If they consider there is a breach of the settlement agreement, their only option is either to accept the breach and continue to make the payments, or to suspend the payments and give notice of the act or omission contended to amount to a breach.
>
> [39.] Likewise, in this case, it is clear from reading the whole of clause 6.5 that the Land Companies did not have the power to finally determine whether or not there had been breach of the settlement agreement by the Plot Owners."

60. And at paragraph 48 the Senior Master also said this:

> "[48.] There is a binary choice open to the Land Companies at clause 6.5.1, not a range of options, namely to treat an act or omission relied on as a breach, suspend payments and give notice under sub-clause 6.5.1, or to overlook the breach and continue the payments."

61. This means that I do not accept the respondents' arguments that forming an opinion and electing to take action based on that opinion, i.e. serving a notice, constitutes a contractual discretion which engages the principles set out in *Braganza*. The right of the Land Companies under clause 6.5.1 is not a decision by the Land Companies which can be properly characterized as one to which the principles in *Braganza* apply. The Land Companies' right is unilateral and, as such, can be exercised in such a way that best suits the interest of the Land Companies. That right does not give rise to any conflict of interest in the relevant sense and it is not a contractual right that is subject to the obligations of the procedural or substantive fairness akin to the public law duties which apply to the decision of the executive.

62. Mr Assersohn referred to, and placed most reliance on, the case of *Shurbanova v Forex Capital* and said that clause 6.5 was an analogous to the subjective assessment under clause 26 of the contract in that case where, in the context of foreign exchange trading, the company could make a determination as to whether a particular situation amounted to what was described as a "manifest error". However, in that particular case, the company was under express obligation to "act fairly towards the client". Absent the obligation of fairness, the judge held that the company would have been under a duty to conduct a determination in a way which was not arbitrary, capricious or irrational in the public law sense as explained in *Braganza*. In my view, the case of *Shurbanova* does not help the respondents. This is because it is plain from clause 26 that the company is the contractually agreed decision-maker and the primary decision-maker as to whether there was a manifest error as defined in the contract. That, it seems to me, is very different from the clear provisions of clause 6.5, which provide that the court is the decision-maker as to whether the Land Companies are entitled to suspend payment, and therefore the underlying notice is valid.

63. Further, any notice served by the Land Companies had to identify the acts or omissions contended to constitute the breach and, in the context of any proceedings, it will be for the court to determine whether those contentions set out in notice are justified, given they form the basis on which the payment of instalments have been suspended under clause 6.5.1. This is not therefore a situation where, as the respondents contend, a notice can be served without any reasons being given. Furthermore, I do not see there is any basis in the respondents' point that the Land Companies were under a duty under clause 6.5.1 to "conduct the determination as to whether or not there was a breach of the settlement agreement in a way which was not arbitrary, capricious or irrational". Rather, if the Land Companies considered there to be a breach of the settlement agreement, they were absolutely entitled to act entirely in their own interests in serving notice under clause 6.5.1 identifying the acts or omissions constituting a breach if they thought that was the best way forward.

64. On that basis, I do not see any reason to distinguish this case from the analysis provided by Jackson LJ in the *Mid-Essex Hospital* case at, for example, paragraphs [89(vi)] to [94]. As in that case, there is no need for any control mechanism to regulate the operation of clause 6.5.1 as that control mechanism will be provided by the court (and I disagree with the analysis of the Senior Master at paragraph [47] of her judgment).

65. The Plot Owners were quite entitled to challenge the notice under clause 6.5.2 and then commence proceedings challenging any suspension of payment of instalments as has, indeed, happened in this case.

66. I have therefore formed the very clear view that there is no legal basis on which a *Braganza* duty can be implied into clause 6.5.1 of the settlement agreement, such that prior to the service of the notice under that clause, the Land Companies were under a duty to determine whether there had been a breach of contract in a way which is arbitrary, capricious or irrational in the public law sense. That is the basis upon which the respondents have sought to justify the implied term alleged at paragraph 9 of the particulars of claim and as a result, in my view, the existence of that term on that basis is bound to fail. I have therefore concluded that the Senior Master's decision in relation to what she described as the first implied term is wrong, and no such term can be implied into the settlement agreement.

67. The consequence of this is that as the Land Companies are not making a decision which affects both parties, there is no conflict of interest under clause 6.5 between the interests of the Land Companies, on the one hand, and the Plot Owners, on the other. If there is no conflict, then there can be no imbalance of power between the contractual parties in relation to clause 6.5. Further, the particulars of claim, and indeed the reply, do not contain any allegation that there was an imbalance of power between the parties and there is no evidence before the court to support his point. I pressed Mr Assersohn on this during the course of his submissions and he accepted that an allegation of imbalance of power did not form any part of his clients' pleaded case. I therefore consider that the Senior Master was wrong to conclude, as she did at paragraph 49 of her judgment, that it is reasonably argued to a Part 24 standard that there was an imbalance of power between the parties to the settlement agreement. In my view, this point does not arise as I have formed a clear view there is no conflict of interest and there is in any event, no pleaded allegation or evidence to support it.

68. Given that, on analysis, the claim against the appellants is formulated on the basis that there

is a breach of the terms alleged at paragraphs 9.1 and 9.2 of the particulars of claim, the respondents' claim against them must fail unless the Senior Master was wrong to find that the second implied term should be struck out as alleged in the respondents' cross-claim. The respondents' cross-appeal is predicated on the same argument based on *Braganza* that the respondents advanced in relation to the appellants' appeal. The second implied term was at paragraph 9.2 of the particulars of claim and provided that: "Such a Notice must be accompanied by sufficient evidence that the alleged breach had occurred or, alternatively that the Party serving notice must have had sight of sufficient evidence to justify the serving of the Notice."

69. In essence, Mr Assersohn, on behalf of the respondents, says that if the *Braganza* duty is implied into clause 6.5 of the settlement agreement, then the Land Companies can only go through or comply with that duty if they have evidence. He says that the second implied term flows from the first implied term, and for that reason the Senior Master erred in striking out this part of the particulars of claim against the appellants.

70. Putting on one side the fact that the revised respondents' notice was served out of time and the cross-appeal was also served out of time, I let Mr Assersohn advance his clients' arguments so that I could understand the substance of the point he was making, and also form a view of the merits of this point. Given the clear view I have formed in relation to the appellants' appeal, it seems to me that the Senior Master was correct to decide that the respondent had no real prospect of establishing the implication of the second implied term. In these circumstances, in my view, the proposed cross-appeal was hopeless.

71. Further, I do not consider it appropriate to extend time for service of the revised respondents' notice and cross-appeal. I accept that service of the respondents' notice and cross-appeal was 14 days out of time is not the most serious or significant breach of the rules, particularly as the appeal did not come on for hearing until January 2020. However, the judgment of the Senior Master was available on 26 April 2019 and, from that date, the respondents knew they had lost on the second implied term. I am not therefore satisfied that Mr Shutes' evidence set out at paragraph 29 above provides a good reason for the delay in serving the revised respondents' notice and the cross-appeal: see in particular in *Denton v TH White Limited* [2014] EWCA Civ 906 at paragraph 12.

72. I should also say something about the revised respondents' notice, and the grounds set out in it. Grounds 1 and 2 of the additional grounds are arguments in relation to the *Braganza* duty which the respondents can, and did, advance in any event. Ground 3 is irrelevant as it is agreed between the parties that there are no additional facts to be advanced at trial. Ground 4 is also irrelevant as the points made in the particulars of claim and reply in relation to the *Braganza* duty have all been taken into account. Ground 5 also does not arise. This is because, whether or not the claim should be struck out, depends on an analysis of the pleadings and that point was, and in any event, advanced by the respondents.

73. Therefore, the time for service of the respondents' notice and cross-appeal should not be extended and, if I am wrong about that, then: (1) I refuse the respondents permission to appeal in respect of the cross-appeal for the reasons set out above; and (2) the additional grounds set out in the respondents' notice do not alter my view as to why the appeal against the Senior Master's order in relation to the first implied term should be allowed for reasons explained in this judgment.

74. Finally, returning to the relief sought in the pleading against the appellants, it is quite clear to me that the only relief is that set out at paragraph 3 of the prayer for relief. Given there is no claim against the appellants based on the breach of the implied term which was alleged at paragraph 9 of the particulars of claim, it must follow that there is no basis whatsoever for the respondents to seek declaratory relief against them that "the Notice is defective because the Appellant had no reasonable ground for serving it".

75. The claim against the appellants is struck out. I do not say anything about the claims against the other defendants.

76. I therefore allow the appellants' appeal.

End of Judgment

Transcript from a recording by Ubiqus
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com

Ubiqus hereby certify that the above is an accurate and complete record of the proceedings or part thereof

This transcript has been approved by the judge.