Applying Wednesbury Reasonableness to Legal Review of Trustee Discretions after Braganza and Pitt v Holt

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Trustees under express trusts have a number of powers and discretions and decisions that need to be made.[1] The exercise (or non-exercise) of these decision-making powers are subject to review by the courts. Trustees will want to know what they need to do in order to exercise a relevant discretion properly and others affected (eg beneficiaries or third parties) will want to know when they can successfully challenge a decision in a court.

There are obvious similarities between decision making by trustees and decision making by public bodies. Both have discretions (conferred by the trust instrument or legislation) that they do not (in the main) exercise in their own interest and owe duties to others. The question arises as to whether the legal review of relevant decision making is then the same, or similar in some respects, as between trustees and public authorities.

A number of decisions have, over the years, indicated that there are similarities, particularly in applying to trustees the long standing public law *Wednesbury*[2] test (in its two limbs, considering factors that ought to be considered and not reaching a decision that is perverse in the sense that no reasonable decision maker could reach it). Or if not applying *Wednesbury* expressly, at least applying a very similar test.

More recently, in 2013 a seven-judge bench in the Supreme Court in *Pitt v Holt*[3] dealt with legal review of two decisions made by fiduciaries, including trustees.[4] Lord Walker, giving the only judgment, clarified that a breach of trust needed to be shown in order to invalidate a decision, and that there would be no breach of trust if the decision maker had taken 'apparently competent advice'. Lord Walker also echoed criticism that had been made by the Court of Appeal earlier in the case about the use of public law.

However, a little under two years later, in 2015, in *Braganza v BP Shipping*,[5] a five-judge bench in the Supreme Court had to consider what review standard should apply to an exercise of a factual determination provision in a contract of employment. All five judges held that both

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1 In practice such discretions are much more limited for a custodian or bare trustee. They are also much less relevant in non-express trusts (eg constructive or resulting).

2 *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, CA.

3 *Pitt v Holt, Futter v Futter* [2013] UKSC 26, [2013] 2 AC 108.

4 *Pitt v Holt* involved a receiver appointed under the Mental Health Act 1983. The linked case, *Futter v Futter*, involved an exercise of discretion by trustees.

5 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 4 All ER 639.

limbs of the public law *Wednesbury* test should apply to the exercise of a private law discretion. Two of the judges in the Supreme Court then took a different view from the majority as to whether that review standard had in the case been met.

This article considers the impact of *Pitt v Holt* and *Braganza* on the tests applied by a court in relation to a decision by trustees and reaches the conclusion that, following *Braganza*, the two stage public law *Wednesbury/Braganza* reasonableness tests (applying the public law *Wednesbury* tests by analogy) apply to legal review of decisions made by trustees. The article deals with the laws of England and Wales, but the common law (and equitable) position does not seem to differ much in the other major common law jurisdictions (eg Australia, New Zealand, Singapore, Hong Kong or Ireland).[6]

Braganza

Braganza[7] broadly confirmed a trend to apply (in appropriate cases) a similar test in private law cases to the *Wednesbury*[8] reasonableness test developed in public law, applying both limbs of the public law *Wednesbury* test to the contractual decision-making power held by BP Shipping as employer to determine the cause of death at sea of its employee, Mr Braganza.

Braganza applied both limbs of the public law *Wednesbury* test to a discretion for an employer in a private law contract. The decision maker must:

(1) **Process (*Braganza* 1):** take into account all matters it ought to take into account (sometimes shortened to consider all relevant matters and exclude all irrelevant matters); and
(2) **Outcome (*Braganza* 2):** reach a decision which is not so unreasonable that no reasonable decision-maker could have come to it.

Braganza concerned a factual determination being made by an employer, but the decision has been cited and followed in many later cases outside the employment or pensions context, both in England and Wales and other jurisdictions (notably Australia and New Zealand).

Much of the caselaw considers the application of the *Braganza* test in other contexts (eg leases, share options) and *Braganza* itself expressly notes that its application and 'intensity' are context specific. It seems clear that the *Braganza* tests will usually apply to most decisions and discretions of employers and principal companies under occupational pension schemes. There seems no reason why the *Braganza/Wednesbury* tests should not apply, by analogy with public law, to decisions and discretions of trustee boards and other trustees as well (despite comments to the contrary in *Pitt v Holt*[9]).

6 The position may differ where there has been statutory intervention – particularly in those jurisdictions (eg Jersey and Bermuda) which have enacted legislation with the aim of reversing the part of the decision of the UK Supreme Court in *Pitt v Holt* dealing with there being a need for a breach of duty.

7 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 4 All ER 639.

8 *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, CA. It is perhaps ironic that in public law cases the test of *Wednesbury* unreasonableness is having a lesser role in recent years in public law cases. Richard Nolan made this point in 'Controlling Fiduciary Power' [2009] CLJ 293 at 302. See also Lord Carnwath (extra-judicially) 'From rationality to proportionality in the modern law' (2014) 44 HKLJ 447. *Wednesbury* is making a comeback in public law outside fundamental EU rights – see, eg *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 at [75] and [79].

9 *Pitt v Holt, Futter v Futter* [2013] UKSC 26, [2013] 2 AC 108.

Trustee decisions and discretions

Such decision-making[10] powers can be of:

- a factual nature (eg in the view of the decision maker, is a factual situation met?) – these tend to be more binary (ie is the fact situation met or not); or
- a more discretionary nature (eg how are assets invested, can an amendment power be exercised?) These can more often allow for a range of potential outcomes.

Trusts, such as private sector pension schemes in the UK, include many powers and discretions held by various parties. In UK pension trusts this can be the employer, a principal company,[11] the trustee board, or indeed an advisor such as the actuary. In other trusts, third parties may have roles, eg protectors.

Such decision-makers will want to make sure that they make the right decisions consistent with their powers and duties under the contract or scheme and in line with any tests implied by law.

Conversely others, affected by the decision (or potential decision), may want to challenge a decision or stop it from being carried out or claim for loss or damage flowing from the decision.

Courts will generally respect decisions made within powers by a decision maker or trustee board. If the trust or contract expressly gives the power/discretion to (say) the employer or trustee, then there is in general no right of appeal to the courts – no general merits review.

Some powers or discretions may be absolute and unfettered and not subject to general judicial review (absent fraud or dishonesty). These are most likely to arise when a power or discretion is not held by a fiduciary and is linked to a property right or would otherwise in its context be problematic to be reviewable.[12]

However, there clearly can and should be some review by the courts in some cases. For trustees this is likely to apply to all decisions and discretions. Robert Walker J in *Scott v National Trust*[13] held: 'Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision.' Robert Walker J cited the decision of the House of Lords in *Dundee General Hospitals Board of Management v Walker*,[14] where Lord Reid said that even where trustees are expressed to have an absolute discretion:

> 'If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith, then there was no true decision and the court will intervene.'

10 Categorising a power as discretionary or just fact determinative can be difficult: see, eg *Carty v Croydon LBC* [2005] EWCA Civ 19, [2005] 1 WLR 2312 and, in Australia, *Dwyer v Calco Timbers Pty Ltd* [2008] HCA 13, 234 CLR 124 and *Finch v Telstra* [2010] HCA 36, 242 CLR 254. Discussed in Ch 8 (Nature of discretion) in Pollard '*Pensions, Trusts and Contracts*' (n 1 above). Binary (yes or no) fact determinations are in practice more intensively scrutinised by a court compared to more discretionary decisions. See Lord Hodge in *Braganza* at [57].

11 Who may or may not also be (or have in the past been) an employer of members in the scheme.

12 See Ch 9 in Pollard, *Pensions, Trusts and Contracts*.

13 [1998] 2 All ER 705 (Robert Walker J) at 717g. An unreserved judgment. Later approved by Lord Walker (as he had then become) in *Pitt v Holt* [2013] 2 AC 108 at [10].

14 [1952] 1 All ER 896, HL per Lord Reid at 905.

Different rules may apply if trustees ask the court to approve a major decision – eg *MNRPF*,[15] but even this is moving towards applying *Braganza* style rationality tests – *Airways Pension Scheme Trustee Ltd v Fielder.*[16]

Unlike (say) decisions made by a court, there is no general right of appeal or re-hearing to the courts generally on the merits of a decision made under a trust (such as a pension scheme) or a contract or articles of association of a company. The relevant instrument provides that the decision in relation to the discretion or power is held by the relevant person. The courts will not re-write the provision to allow the court a right of general review, eg if it would have made a different decision on the relevant facts.[17]

Partly this reflects respect for the terms of the contract (or trust) and partly an acknowledgement in some cases that the decision maker has an expertise that the court does not possess.

But there are often limits to this judicial restraint. Even in contract cases, the courts may well find that decision makers' decisions are reviewable at the extremes, even absent fraud or an absence of good faith. This is similar to the role of the courts in the well trodden area of public law when reviewing decisions of public authorities.

The extent of this review leads to two issues:

(a) For the decision maker, how does he, she or it make a proper (and non-challengeable) decision? What is the extent of its duties? What does it need to do to make a proper decision?
(b) For the non-decision maker, what are the circumstances when a decision can be challenged (and what is the nature of that challenge)? And other parties may be expected to act on the basis of the relevant decision – when are they expected to only so act if the decision is not challengeable?

Nature of challenge

Conversely, parties affected by a decision may want to challenge that decision, in practice before the court. The context of a challenge is important to consider when looking at a particular judgment:

(a) Who is bringing the challenge? (eg a beneficiary or an employer or a member or a new trustee?)
(b) What remedy is being sought, for example compensation or damages; rescission or cancellation of the decision, replacement of the trustee, re-decision etc? This can be relevant as to the extent of the relevant scrutiny (eg it may perhaps be more difficult to overturn a decision instead of claiming damages).

15 *Re Merchant Navy Ratings Pension Fund; Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd* [2015] EWHC 448 (Ch), [2015] Pens LR 239 (Asplin J). Citing *Public Trustee v Cooper* [2001] WTLR 901 (Hart J) and *Cotton & Moore v Earl of Cardigan* [2014] EWCA Civ 1312, [2015] WTLR 39. See Daniel Clarry, *The Supervisory Jurisdiction over Trust Administration* (Oxford University Press, 2018) at Ch 4.

16 *Airways Pension Scheme Trustee Ltd v Fielder* [2019] EWHC 3027 (Ch) (Zacaroli J) at [5], citing *MF Global UK Ltd* [2014] EWHC 2222 (Ch) (David Richards J). This applies even if relevant litigation has previously been authorised by a court order under the Beddoes jurisdiction: *Airways Pension Scheme Trustee Ltd v Fielder* [2019] EWHC 3032 (Ch) (Zacaroli J) at [20].

17 Eg Lady Hale in *Braganza* at [18] and [19]. This is longstanding in public law – see, for example the comments of Lord Greene MR in *Wednesbury* [1948] 1 KB 223 at 228. Statute can sometimes include a more general review power, eg under the Pensions Act 2004 there is a right to refer some decisions of the determinations panel of the Pensions Regulator to the Upper Tribunal for a rehearing.

(c) Who actually made the decision? Was it a trustee (a fiduciary) or an employer (not usually a fiduciary) or a third party (eg an actuary or a valuer)?
(d) What were the reasons for the decision? What material did the decision maker consider? What factors or considerations were material?[18]

Nature of decision

A decision-making power or duty under a trust or contract can be of various forms, including:

(a) A full discretion, ie with a range of various potential outcomes. For example, how much to pay under a discretionary trust, whether a trustee should agree to a scheme amendment and the form of the amendment.
(b) A binary fact discretion – for example, 'in the opinion of the trustee' is a relevant test met – is the person a child of the settlor, is a member incapacitated?

This need for a decision can be distinguished from the position where a person (eg a trustee) is directed to do something if a particular fact is satisfied, for example pay a child of the settlor when she reaches age 21 or pay a pension when a pension scheme member reaches age 65. In this case there is no discretion given to the trustee – the payment must be made if the facts are proved (if disputed as the court may decide).[19]

Grounds of challenge – general

Despite the general desire to respect the terms of the contract or trust and to leave the relevant decision to the relevant decision-maker, the courts will still review a decision and allow a challenge in a number of ways. Set out below is a brief list of some of the major ways in which decisions can be challenged.

This article focuses on the application of the *Braganza* tests to trustees. *Braganza/ Wednesbury* provides two grounds for review:

(1) Proper process, usually acting with due consideration (eg considering relevant factors) – this is the first, process, limb of *Braganza/Wednesbury*.
(2) If a decision is fully irrational (or perverse), ie a decision that no reasonable decision maker could have reached. This is a (stiff) outcome test and the second limb of *Braganza/ Wednesbury.*

Who is making the decision?

Who is making the relevant decision is also relevant to the issue of what legal review is appropriate. A decision being made by a trustee or other fiduciary is likely to be more intensely reviewed.

18 This material may not be available to a potential challenger. The decision maker may not, depending on the circumstances, be obliged to give its reasons or disclose its material.
19 Eg the Court of Appeal in *British Telecommunications Plc v BT Pension Scheme Trustees Ltd* [2018] EWCA Civ 2694, [2019] Pens LR 10 per Asplin LJ at [24] and [25] on whether or not an index 'becomes inappropriate' with no decision maker expressly stated.

The type of decision being made is also relevant. In a trust or contractual context there seem to be at least three types of decision:

(1) one that involves an 'absolute' discretion (and so is not reviewable at all) – in a pensions context, this is most likely to arise in relation to an employer discretion or a member right;
(2) a decision as to a matter of fact; or
(3) a general discretion about whether or not to do something.

This is flagged in the Supreme Court decision in *Braganza* itself, saying that the test is context specific.

It seems clear that a factual decision (in *Braganza* itself it was whether or not an employee had committed suicide) is considered more reviewable than a general discretion, for example whether or not to amend the scheme, whether not to close the scheme, whether or not to increase or reduce benefits, whether or not to give a bonus or pay rise or not.

An 'absolute' discretion may not be reviewable at all under the *Braganza* test. Examples in a commercial context may be whether or not to terminate a contract for breach.[20] This is discussed further below.

Legal review of decisions: major tests

It is helpful to look at the *Braganza* tests in context, by briefly considering the other legal review tests that can apply. A whole range of tests have been developed by the courts as part of the process of controlling discretionary powers and decision making, particularly (but not exclusively) when exercised by fiduciaries, such as trustees[21] or directors.

Where a power or discretion is held under a contract or trust (or company constitution) a number of factors come into play if the decision is challenged in the court, ie if the courts are asked to review the decision.

At one end of the scale is the fact that the relevant structure gives the decision-making power to the relevant decision-maker: not to the courts and not subject to a general right of appeal to the courts. At the other end of the scale is a need for some limits and review on the process. The parties will often be intended not to confer an absolute untrammelled and unconstrained power to the decision maker to make whatever decision he, she or it thinks fit, with no judicial control. This was analysed by Lady Hale in the *Braganza* case (see below).

But in some circumstances, the courts may well find that a decision is not intended to be limited – in a contractual setting, this may well depend on factors such as whether there is a potential conflict of interest or whether the parties have a particular need for speed. The intensity of review may well depend also on the size and resources of decision maker (eg *Braganza*).[22]

Nine major tests for trustees?

There are nine major grounds of legal review. They overlap – and there may be others – but looking at the caselaw in both Britain and Australia it does seem to be inching towards a

20 See 'Intensity of review' at ch 45 in Pollard, *Pensions, Trusts and Contracts*.
21 See Newey J (extra-judicially) 'Constraints on the exercise of trustees' powers', ch 2 in P G Turner (ed) *Equity and Administration* (Cambridge University Press, 2016); and Richard Nolan 'Controlling Fiduciary Power' (2009) CLJ 293.
22 See Ch 45 in Pollard, *Pensions, Trusts and Contracts*.

coherent structure. The nine major tests for a decision maker when exercising a discretion or making a decision under a trust are:

(1) Act honestly (ie good faith)
(2) Within the terms of the power
(3) (part of test two) By the specified person, in the specified way and at the specified time
(4) For a proper purpose
(5) No unauthorised conflict (fiduciaries)
(6) With due care and skill
(7) With due consideration (process part of test six?)
(8) Consider the reasonably discoverable and relevant factors: *Braganza 1*
(9) Not be perverse, capricious or fully irrational – 'no reasonable decision maker': *Braganza 2*.

Note that it is better to consider that there is no (or at least no literal) overarching 'act in best interests' test in the UK (part of proper purpose test in Test 4 instead).[23]

The aim of this list is to give a useful checklist for those making decisions (and those advising them). It suffers from necessarily being relatively high level – some of the points made in the case law (eg on delegation or making decisions at the right time) or in some commentary get into more detail,[24] but these seem to flow as a matter of logic from the higher level tests.

Really only five major tests, with nine main limbs

These nine major tests actually boil down to five (perhaps with nine limbs?) Those five major tests for a decision maker when exercising a discretion or making a decision under a trust are:

(1) Act honestly (ie good faith)
(2) Within the terms of the power
    (a) By the specified person, in the specified way and at the specified time
(3) For a proper purpose
(4) No unauthorised conflict (fiduciaries)
(5) With due care and skill:
    (a) Process: With due consideration
    (b) Process: Consider the reasonably discoverable and relevant factors – *Braganza*
    (c) Outcome: Not be perverse, capricious or fully irrational – 'no reasonable decision maker' – *Braganza*.

Good faith and trusts

Clearly the courts will review a decision made by a fiduciary in bad faith, ie if there is dishonesty or fraud. For example, if there is deceit (see the example mentioned by McGarvie J

23 See Pollard 'The short-form 'best interests duty'; Mad, bad and dangerous to know' (2018) 32 TLI 106 and 176.
24 See, eg the lists in relation to trustees in Tucker, Le Poidevin & Brightwell, *Lewin on Trusts* (20th edn) (Sweet & Maxwell, 2020) at 29-033 (listing four grounds of review) and Hayton, Matthews & Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* (Lexis Nexis UK, 2016) at 57.1. See also *Karger v Paul* [1984] VR 161 (McGarvie J) and *Kowalski v MMAL Staff Superannuation Fund Pty Ltd (No 3)* [2009] FCA 53 (Finn J) at [22].

in *Karger v Paul*[25]). The courts of equity being founded on conscience, this is an obvious control. Where there are impacts on third parties, fraudulent acts may in some cases not be overturned: *Fairfield Sentry Ltd v Migani*.[26]

Some of the older case law indicates that lack of good faith or honesty may be the only control. For instance, that trustees acting honestly and in good faith cannot have their decisions overturned: *Re Beloved Wilkes's Charity;*[27] *Duke of Portland v Topham*.[28]

Thus in 1877 in *Gisborne v Gisborne*,[29] where the decision was at the trustees 'discretion and of their uncontrollable authority', it was held by the House of Lords that a bona fide exercise will not be reviewed by the court. But the court considered the exercises of the discretion in question to be a reasonable exercise.[30] And in the next decade, the House of Lords moved to a more stringent duty of care based on (at least) prudence and 'the ordinary prudent man of business'.[31]

In present times, good faith, at least in the context of trusts, is better considered now as meaning the same as honesty.[32] The use in the older cases of a potential wider meaning of 'good faith' should be regarded as seeking to encapsulate what has now become the other grounds of review outlined below (eg proper purpose and due consideration).[33]

In 1965 in *Re Londonderry's Settlement*,[34] Salmon LJ held:

> 'The settlement gave the absolute discretion to appoint to the trustees and not to the courts. So long as the trustees exercise this power bona fide with no improper motive, their exercise of the power cannot be challenged in the courts – and their reasons for acting are, accordingly, immaterial.'[35]

It can be argued that the terminology of 'bad faith' or 'mala fides' under *Gisborne* (and later cases) in a trustee context could extend to include perversity.[36]

But good faith (or bad faith) seems to be better seen (in a trustee context at least) as involving a subjective standard (similar to dishonesty). David Maclean, in *Trusts and Powers*,[37] commented that a decision can be (say) perverse without being made in bad faith, citing *Tabor v Brooks*[38]

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25 [1984] VR 161 (McGarvie J) at 175.

26 [2014] UKPC 9, [2014] 1 CLC 611. Contrast an internal transaction: *Skandinaviska Enskilda Banken AB (Publ) v Conway and another (as Joint Official Liquidators of Weavering Macro Fixed Income Fund Ltd)* [2019] UKPC 36 at [19].

27 (1851) 3 Mac & G 440, 42 ER 330 (Lord Truro LC).

28 (1864) 11 HLC 31. See also *Re Londonderry's Settlements* [1965] 1 Ch 918, CA, *Whishaw v Stephens; Re Gulbenkian's Settlement Trusts* [1970] AC 508 at 518, *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 427, 428–429.

29 (1877) 3 App Cas 300, HL.

30 See Lord Penzance at 309, and Lord O'Hagan at 311.

31 See *Speight v Gaunt* (1883) 9 App Cas 1, HL at 19, per Lord Blackburn, approving Jessel MR in the Court of Appeal (1882) 22 Ch D 727 at 739–740 and *Re Whiteley* (1886) 33 Ch D 347, CA at 355, per Lindley LJ, on appeal *Learoyd v Whiteley* (1887) 12 App Cas 727, HL. The concept of 'prudence' is itself not very clear and is probably now better seen as being the same as 'reasonableness' (see eg the Law Commission report 'Fiduciary Duties of Financial intermediaries' (2014) at 3.72, discussing the Trustee Act 2000.

32 See, eg *Karger v Paul* [1984] VR 161 (McGarvie J) at 164 and *Medforth v Blake* [2000] Ch 86, CA at 103.

33 See, eg *Re Marsella; Marsella v Wareham (No 2)* [2019] VSC 65 (McMillan J) at [36].

34 *In re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918 per Salmon LJ at 936G.

35 See also Lord Reid to similar effect in *Re Gulbenkian's Settlement* [1970] AC 508 at 518C.

36 See, eg Michael Ashdown, *Trustee Decision Making* (Oxford University Press, 2015) at 3.36. See also *Marsella v Wareham* [2019] VSC 733 (McMillan J) at [37]:

> 'In this context a lack of good faith, or mala fides, encompasses more than fraud. It may include the taking account of irrelevant considerations and a refusal to take into account relevant considerations … "Mere carelessness or honest blundering" will not amount to mala fides. [*Jones v Gordon* (1877) 2 AC 616, 628]'.

37 D M Maclean, *Trusts and Powers,* (Sweet & Maxwell, 1989), p 58, n 78.

38 (1878) 10 ChD 273 (Malins V-C).

and that '[M]ala fides is not constituted by honest blundering, carelessness or even gross negligence'.[39]

Some of the caselaw treats bad faith (or lack of good faith) as being a subjective test, effectively involving dishonesty or at least intentional impropriety. For example, in *Medforth v Blake*,[40] a case on the duties of a receiver appointed by a mortgagee, Sir Richard Scott V-C, having held that such duties included a duty of good faith, said (at 103B–D):

> 'I do not think that the concept of good faith should be diluted by treating it as capable of being breached by conduct that is not dishonest or otherwise tainted by bad faith … the breach of a duty of good faith should, in this area as in all others, require some dishonesty or improper motive, some element of bad faith, to be established.'

The concept of 'good faith' is tricky.[41] It appears in various areas of the law, in each case with a 'distinct body of authority as to its meaning and application'.[42]

It seems to be better to move away from a good faith/bad faith test as being the only grounds of review (rather than trying to construe bad faith as encompassing irrationality or perversity, for example, as attempted in *Jacobs' Law of Trusts in Australia*,[43] unless perhaps a deliberate and wilful refusal to carry out due consideration).

In *Dundee General Hospitals*,[44] Lord Reid held that even where trustees are expressed to have an absolute discretion:

> 'If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith, then there was no true decision and the court will intervene.'

Robert Walker J (as he then was) followed this in an unreserved judgment in *Scott v National Trust*,[45]

> 'Certain points are clear beyond argument. Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will, on occasion (indeed, quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever. It is however for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions, even to experts.'

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39 Citing *Jones v Gordon* (1877) 2 App Cas 616 at 628–629 and *Karger v Paul* [1984] VR 161 at 164. See also to the same effect *Royal Brunei Airlines v Tan* [1995] 2 AC 378, PC at 389 and *Marsella v Wareham* [2019] VSC 733 (McMillan J) at [37], citing *Jones v Gordon* (1877) 2 AC 616, 628.

40 *Medforth v Blake* [2000] Ch 86, CA per Scott V-C at 103B–D. Discussed in relation to an exoneration clause in a trust in *Barnsley v Noble* [2014] EWHC 2657 (Nugee J) at [265] to [267] (decision upheld by the Court of Appeal: *Barnsley v Noble* [2016] EWCA Civ 799, [2017] Ch 191).

41 See Richard Nolan and Matthew Conaglen 'Good faith: What does it mean for fiduciaries and what does it tell us about them?', Ch 14 in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010); Lusina Ho, 'Good Faith and Fiduciary Duty In English Law' (2010) 4 J Eq 19 and Charles Mitchell 'Good Faith, Self-Denial and Mandatory Trustee Duties' (2018) 32 TLI 92.

42 *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* [1993] FCA 638, 45 FCR 84 per Gummow J at [31].

43 J D Heydon and MJ Leeming *Jacob's Law of Trusts in Australia,* (8th edn) (LexisNexis, 2016) at [16-09].

44 *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896, HL per Lord Reid at 905.

45 *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (Robert Walker J) at 717.

Some of the modern case law uses the term 'good faith' in a wider sense (beyond just honesty) to include a lack of arbitrariness, etc, in effect applying one or both limbs of the *Braganza* tests. In *Hayes v Willoughby*,[46] Lord Sumption commented on a meaning of good faith as encompassing a 'logical connection' between the evidence and the reason for a decision and this meaning an absence of arbitrariness, etc. He commented:

> '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. 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.'

Public law analogy in private law discretions?

Some aspects of private law, particularly those involving review of discretions are clearly similar to public law in many respects. This is particularly true in relation to decisions and actions of trustees and other fiduciaries (eg directors). Just as with public officials, trustees are not usually acting for their own benefit, but instead for a relevant purpose, usually the benefit of a structure or third party.

The two areas have tended to borrow from each other over the years, and in some cases public officials are seen as being fiduciaries in a similar role to trustees. It may therefore be appropriate to look at how the 'no unlawful fetter' rules have been applied in public law cases.[47]

But public law is different to private law. The issue is, how different? It is clear that public law concepts should not all be imported and applied in a private law context. In a private trust case, *Re Barr's Settlement Trusts, Abacus Trust Co (Isle of Man) v Barr*,[48] Lightman J identified three important differences: the discretionary nature of relief on judicial review, a different approach to nullity, and strict time limits.

But, following the decision in *Braganza* particularly, it seems appropriate to have a selective borrowing in this area – at least the two limbs of the *Wednesbury* review of decisions.

There is an example of this (before *Pitt v Holt*) in *Byng v London Life Association Ltd*,[49] where the Court of Appeal applied proper purposes and public law *Wednesbury* tests to a review of decisions by a chair of a shareholder meeting.

Before *Pitt v Holt*, various trust cases, including the pension cases *Harris v Lord Shuttleworth*,[50] *Edge v The Pensions Ombudsman*[51] and *Wild v Pensions Ombudsman*,[52] had looked at a review

46 [2013] UKSC 17, [2013] 1 WLR 935 per Lord Sumption at [14]. Cited by Lady Hale in *Braganza* at [23] and the Court of Appeal in *IBM United Kingdom Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] ICR 1681 at [227].

47 This is suggested by *Thomas on Powers*, (2nd edn) (Oxford University Press, 2012) at 10.74 and by Finn, *Fiduciary Obligations* (Sydney, Law Book Co, 1977) at [62].

48 [2003] Ch 409 at [29]. Cited by Lord Walker in *Pitt v Holt* at [11] – see below.

49 [1990] Ch 170, CA per Browne-Wilkinson V-C at 189B and Mustill LJ at 194C.

50 [1994] ICR 991, [1995] OPLR 79, CA per Glidewell LJ at 999G.

51 [2000] Ch 602, CA per Chadwick LJ at 627–630. Cited on this in later cases, including *Merchant Navy Ratings Pension Fund Trustees Ltd v Chambers* [2002] ICR 359, [2001] OPLR 321, [2001] PLR 137 (Blackburne J) at [7] and *Merchant Navy Ratings Pension Fund Trustees v Stena Line* [2015] EWHC 448 (Ch), [2015] PLR 239 (Asplin J) at [16] and [161].

52 [1996] OPLR 129 (Carnwath J) at 135. Cited by Chadwick LJ in *Edge* (below) at 628. See also *Telstra Super Pty Ltd v Flegeltaub* [2000] VSCA 180, 2 VR 276 per Batt JA at [33] noting that 'a decision of a superannuation fund trustee … is different in kind from, and arises in a context different from that of, the exercise of a discretion by a trustee of a trust for bounty or charity.'

of decisions on a very similar basis to *Wednesbury* and in some cases had expressly drawn an analogy with public law review on *Wednesbury* grounds.

The Court of Appeal and Supreme Court in *Pitt v Holt* had clearly drawn back from this approach. The various trustee cases and *Pitt v Holt* are discussed in further detail below.

Professor Finn (since the Supreme Court in *Pitt v Holt*) commented that this division between public law and private fiduciary law is a mistake.[53]

The analogy with public law had also been made in other areas, for example the Court of Appeal in *Socimer International Bank Ltd v Standard Bank London Ltd*[54] referred to various cases on when a contractual discretion in a contract could be challenged, referring to the public law *Wednesbury* test.

In the *IBM* case[55] on an implied duty of trust and confidence as a limit on employer powers (called the 'Imperial duty'), at first instance Warren J followed this:

> '442. Although one must heed Lord Hoffmann's warning in *O'Neill v Phillips* [1999] 1 WLR 1092 (the well-known case concerning unfair prejudice petitions in a company law context) about importing concepts from one area of law to another in an inappropriate way, I do not see any difficulty in using the concepts of irrationality and perversity, as developed in the context of public law, to identify the test for establishing the scope of the Imperial duty.'

Public law: Braganza and trustees

For trustees there was a fairly clear warning away from applying public law by the Court of Appeal in *Pitt v Holt*, although slightly less clear by Lord Walker in the Supreme Court. But two years later in *Braganza*, the Supreme Court unanimously decided that the public law *Wednesbury* test (in both limbs) is the right one to apply in a private law context. In effect *Pitt v Holt* should be treated as impliedly overturned on this point by *Braganza*. There is no express overturning in *Braganza*, in which *Pitt v Holt* was not cited either by counsel or by the judgments (Lord Neuberger and Lady Hale did sit in both cases).

Following *Braganza*, it is clearly right to apply the public law *Wednesbury* irrationality test (in both limbs) to appropriate private law decisions as well, but that there still needs to be caution in the use of other public law concepts. For example, issues on voidness of decisions, who may claim, no implied 'natural justice' rule seem still not to be appropriate.

It could perhaps be argued that *Braganza* (and the pubic law *Wednesbury* test) is limited to contractual discretions and not to family trusts (such as those involved in *Pitt v Holt*), leaving more commercial trusts (such as a pension scheme or unit trust) still to be categorised. But *Braganza* has already been treated as applying in many commercial contexts[56] and, given the existing references to 'relevant factors' and 'no reasonable trustee' in many previous trust cases, it seems right that *Braganza* will be applied to trustee decisions as well.

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53 Paul Finn 'Fiduciary Reflections' (2014) 88 ALJ 127 at 128. See also Paul Finn 'Good Faith and Fair Dealing: Australia' (2005) 11 NZBLQ 378, cited by Stephen Kos 'Constraints on the Exercise of Contractual Powers' (2011) 42 VULR 17 with comments at pp 35 and 36. Also Lionel Smith 'Prescriptive fiduciary duties' (2018) 37 UQLR 261 at 287 commenting that the parallels between the judicial control of fiduciary powers and the judicial control of power and authority in public law are very significant, citing Paul Finn, 'Fiduciary Reflections' (2014) 88 ALJ 127.

54 [2008] EWCA Civ 116, [2008] Bus LR 1304, CA per Rix LJ at [66].

55 *IBM United Kingdom Holdings Ltd v Dalgleish* [2014] EWHC 980 (Ch) (Warren J).

56 See Ch 44 in Pollard, *Pensions, Trusts and Contracts*.

It is also noticeable that the three 'important differences' noted by Lightman J in *Barr*[57] and cited by Lord Walker in *Pitt v Holt*, namely 'the discretionary nature of relief on judicial review, a different approach to nullity, and strict time limits' are all procedural differences and do not relate to the substantive review of the relevant decision.

Public law Wednesbury test applied

A 'relevant/irrelevant factors' test, is, of course, derived from the similar '*Wednesbury*' test applied in the review of decisions by public administrative bodies following the 1948 decision of the Court of Appeal in *Wednesbury*.[58]

Nearly 20 years before *Pitt v Holt*, Sir Robert Walker (as he then was) extrajudicially in a talk in Cambridge[59] had made the point that: 'There is an important balance to be struck here between the procedure of perfectly informed decision-making and the need for practical certainty'. Having said that, it now appears that it is appropriate to apply the *Wednesbury* test to private law situations. In *Braganza*,[60] all five justices in the Supreme Court were happy to apply the full *Wednesbury* test to a decision being made by an employer in relation to a death benefit (the dissenting two JSCs considered that the employer had satisfied the standard required, but the other three JSCs held that it had not and so invalidated the employer's decision).

In *Braganza*, Lady Hale (giving the main decision of the majority) addressed this full on (although not referring to *Pitt v Holt*). It is helpful to include an extended extract from her judgment:

> '[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 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.
>
> [20] The decided cases reveal an understandable reluctance to adopt the fully developed rigour of the principles of judicial review of administrative action in a contractual context. But at the same time they have struggled to articulate precisely what the difference might be. …
>
> …
>
> [24] … the test of the reasonableness of an administrative decision which was adopted by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 233–234. His test has two limbs:
>
> > "[T]he court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected

57 *In Re Barr's Settlement Trusts, Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 (Lightman J) at [29].

58 *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, CA.

59 'Some Trust Principles in the Pensions Context', Ch 5 in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996). Also at [1996] PLR 107.

60 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 4 All ER 639.

> to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it."
>
> The first limb focusses on the decision-making process – whether the right matters have been taken into account in reaching the decision. The second focusses upon its 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. The latter is often used as a shorthand for the *Wednesbury* principle, but without necessarily excluding the former.
>
> …
>
> [29] If it is part of a rational decision-making process to exclude extraneous considerations, it is in my view also part of a rational decision-making process to take into account those considerations which are obviously relevant to the decision in question. It is of the essence of "Wednesbury reasonableness" (or "GCHQ rationality") review to consider the rationality of the decision-making process rather than to concentrate upon the outcome. Concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision-maker.
>
> [30] It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable – for example, a reasonable price or a reasonable term – the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. For my part, I would include both limbs of the *Wednesbury* formulation in the rationality test. Indeed, I understand Lord Neuberger (at para [103] of his judgment) and I to be agreed as to the nature of the test.
>
> [31] But whatever term may be implied will depend upon the terms and the context of the particular contract involved. I would add to that Mocatta J's observation in *The Vainqueur José*, that 'it would be a mistake to expect [of a lay body] 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' ([1979] 1 Lloyd's Rep 557 at 577). Nor would "some slight misdirection" matter, at least if it were clear that, had the legal position been properly appreciated, the decision would have been the same. 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.
>
> [32] However, it is 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. Given that the question may arise in so many different contractual contexts, it may well be that no precise answer can be given. The particular context of this case is an employment contract, which, as Lord Hodge explains, is of a different character from an ordinary commercial contract. Any decision-making function entrusted to the employer has to be exercised in accordance with the implied obligation of trust and confidence. This must be borne in mind in considering how the contractual decision-maker should approach the question of whether a person has committed suicide.'

Braganza was a case involving the review of a contractual discretion. But the Supreme Court held that *Wednesbury* principles should apply, partly driven by the situation involving a discretion

exercisable by an employer. If an employer is subject to the full *Wednesbury* test, it is difficult to see that a trustee board should be subject to any lesser review standard.

Absolute powers

Seemingly a statement in the relevant trust (or contract) that the decision is 'absolute, final and unchallengeable' may be enough to exclude or modify review by the courts.[61]

Conversely some of the cases look at trusts where the trustee's decision is stated to be 'final'. Despite this the courts reviewed the decision on the irrationality basis. See for example Glidewell LJ in *Harris v Lord Shuttleworth*:[62]

> 'The trustees shall be empowered conclusively to determine all matters, questions, and disputes touching or in connection with the fund's affairs and all claims thereon … every such determination shall be conclusive and binding on all parties.'

In *Saffil*,[63] the trust deed provided that 'the decision of the Trustees shall be final'. Despite this, in both cases the courts reviewed the decision on the irrationality basis.

Merely describing a power or discretion in the relevant contract or trust as 'absolute' or 'sole and absolute' may well not be enough to exclude the *Braganza* irrationality tests. There are a number of decisions where a power or discretion has been described as 'absolute' in the relevant instrument, but the courts have still applied review concepts: see, for example, *Dundee General Hospital*,[64] *TJH and Sons Consultancy Ltd v CPP Group plc*,[65] *Socimer*[66] and *Wellington City Council*.[67]

Conversely if a discretion is not described as 'absolute' or 'uncontrollable' a court may be 'more willing' to intervene': see *Esso Australia Ltd v Australian Petroleum Agents' & Distributors Association*.[68] In practice there may be a higher level of intensity of review (similar to the different levels of intensity described above for factual determinations).

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61 See the case note on *Braganza* by Jonathan Morgan 'Resisting judicial review of discretionary contractual *powers*' [2015] LMCLQ 483 at 487, n 29, noting the argument by Richard Hooley, 'Controlling contractual *discretion*' [2013] CLJ 65 at 81 that any exclusion should not be allowed on public policy grounds or should require a 'clear and unmistakeable exclusion'. In appropriate cases the consumer legislation could apply to such an exclusion (eg the Consumer Rights Act 2015 or the Unfair Contract Terms Act 1977 but note that those Acts do not apply to trusts or employment contracts).

62 [1994] ICR 991, [1995] OPLR 79, CA per Glidewell LJ at 86B. Cited by Park J in *Trustees of the Saffil Pension Scheme v Curzon* [2005] EWHC 293 (Ch), [2005] OPLR 113 at [23].

63 *Trustees of the Saffil Pension Scheme v Curzon* [2005] EWHC 293 (Ch), [2005] OPLR 113 (Park J) at [23].

64 *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896 per Lord Reid at 904. See the discussion in David Foxton, 'A good faith goodbye? Good faith obligations and contractual termination rights' [2017] LMCLQ 360 at 374 and (before *Braganza* in the Supreme Court) in R Hooley, 'Controlling Contractual *Discretions*' [2013] CLJ 65, 79; Christopher Hare, 'The expanding judicial review of contractual discretion: carte blanche or carton rouge?' (2013) JIBFL 269; and Jonathan Morgan, 'Against judicial review of discretionary contractual powers' (2008) LMCLQ 230 at 239.

65 *TJH and Sons Consultancy Ltd v CPP Group plc* [2017] EWCA Civ 46 at [16]. David Foxton also cites other cases (2017) LMCLQ 360 at 374: *Patural v DB Services (UK) Ltd* [2015] EWHC 3659 (QB), [2016] IRLR 286, *Carey Group plc v AIB Group (UK) plc* and, from Australia, *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 at [195] and *Solution 1 Pty Ltd v Optus Networks Pty Ltd* [2010] NSWSC 1060 at [63].

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

67 *Wellington City Council v Local Government Mutual Funds Trustee Ltd* [2017] NZHC 2901 (Collins J) at [165] and [168].

68 *Esso Australia Ltd v Australian Petroleum Agents' & Distributors Association* [1999] 3 VR 642 at 652 and *Ying Mui v Frank Kiang Ngan Hoh (No 6)* [2017] VSC 730 (Vickery J) at [409]. See now on appeal *Hoh v Ying Mui Pty Ltd* [2019] VSCA 203. See also *Thomas on Powers*, (2nd edn) (Oxford University Press, 2012) at [11.12].

In the share option case, *Mallone v BPB*,[69] Rix LJ held that a discretion was reviewable for being fully irrational even though it was described as absolute.

In *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd*,[70] a case on discretions under a re-insurance contract, Males LJ held that the fact that the contract referred to an absolute discretion was not determinative of this point. He held that whether the perversity test applied was a matter for a process of construction which takes account of the characteristics of the parties, the terms of the contract as a whole and the contractual context.

Males LJ held (at [113]):

> 'The judge-arbitrator appears to have regarded the *Mid Essex* case as drawing a sharp distinction between cases of absolute contractual rights and cases where the duty not to act in an arbitrary, irrational or capricious manner could be implied. In my judgment, however, the position is more nuanced. Although the *Mid Essex* case uses the expression 'absolute contractual right' that is the result of a process of construction which takes account of the characteristics of the parties, the terms of the contract as a whole and the contractual context, not a starting point intrinsic to the term itself. It is only possible to say whether a term conferring a contractual choice on one party represents an absolute contractual right after that process of construction has been undertaken. To say that a term provides for an absolute contractual right and therefore no term can be implied puts the matter the wrong way round.'

Similarly, in *British Telecommunications plc v Telefónica O2 UK Ltd*,[71] Lord Sumption (with whose judgment the other Justices agreed) said this was a construction test. He held:

> '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.' (citations omitted)

Braganza – a landmark case

Braganza is a key case in British jurisprudence. *Braganza* is landmark decision of the highest UK court confirming that in private law cases a bare minimum standard of review equivalent to that used in public law following *Wednesbury*[72] can be applied in relation to decisions under a private law agreement. This generally seems to apply to most decisions of an employer or trustee under or in relation to an occupational pension scheme. Some of the case law after *Braganza* is looking at the very question of whether or not a *Braganza* limit applies.

69 *Mallone v BPB Industries Ltd* [2002] EWCA Civ 126, [2002] ICR 1045 at [12] and [40].

70 [2019] EWCA Civ 718, [2020] 1 All ER 16. See also Leggatt LJ at [152] to [155] referring to the construction test and citing Lord Sumption in *British Telecommunications plc v Telefónica O2 UK Ltd* [2014] UKSC 42; [2014] Bus LR 765 at [37].

71 [2014] UKSC 42; [2014] Bus LR 765 per Lord Sumption at [37].

72 *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, CA.

Similar to the laws of negligence following *Donoghue v Stevenson*,[73] the boundaries of *Braganza* will need to be worked out by later case law on a case-by-case basis (a comment also made in *Pitt v Holt*[74]).

Later cases

The Supreme Court judgment in *Braganza* was given in March 2015. There are now over 50 decisions in England and Wales on Westlaw referring to it. There have also been decisions referring to *Braganza* in Singapore,[75] Scotland,[76] Australia,[77] New Zealand[78] Hong Kong[79] and Jamaica.[80] The decision in *Braganza* is also referred to in decisions in Fiji[81] (but dealing with legitimate expectations in a public law context) and Ireland[82] (but there dealing with the factual question of whether someone jumped from a window or fell).

IBM

The Court of Appeal in the *IBM*[83] case on the exercise of employer (and principal company) powers under an occupational pension scheme relied heavily on *Braganza*. The Court of Appeal held that the irrationality test in *Braganza* and *Wednesbury* should apply to non-fiduciary decision makers under a pension scheme.

The relevant factors limb was not argued, so the employer decision was reviewed by reference to the 'no reasonable decision maker' limb (*Braganza 2*). The Court of Appeal overturned Warren J at first instance and held that the employer (and principal company) had not acted irrationally in that sense.

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73 *Donoghue (or M'Alister) v Stevenson* [1932] AC 562, HL(Sc).

74 [2013] UKSC 26, [2013] 2 AC 108 per Lord Walker at [94]: 'the working out of these principles will raise problems which must be dealt with on a case by case basis'.

75 *Leiman, Ricardo v Noble Resources Ltd* [2018] SGHC 166 (George Wei J). At least three earlier decisions in Singapore on discretions followed similar lines and cited the English cases on which *Braganza* is based, including both *Wednesbury* and *Socimer: MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 at [105], *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61, *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2015] SGHC 271 (George Wei J) at [73] to [80].

76 *Teoranta v Opito Ltd* [2018] CSOH 10 (Lord Bannatyne).

77 In particular *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825, 329 ALR 1 (Edelman J) at [1011]; and *Bartlett v Australia & New Zealand Banking Group Ltd* [2016] NSWCA 30. *Hannover Life Re of Australasia Ltd v Jones* [2017] NSWCA 233 referred to, but did not apply, the *Braganza* test (on the grounds that in Australia decisions of insurers are subject to a different general reasonableness review). *Braganza* was also mentioned by Edelman J in the High Court of Australia in a public law review case, *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 at [133]. *Braganza* and *Mineralology* were considered by Lee J in two contractual cases: *Avenia v Railway & Transport Health Fund Ltd* [2017] FCA 859 at [215] and *Bupa HI Pty Ltd v Andrew Chang Services Pty Ltd* [2018] FCA 2033 at [120].

78 Eg *Peregrine Estate Ltd v Hay* [2017] NZCA 496, [2018] 2 NZLR 345 and *Wellington City Council v Local Government Mutual Funds Trustee Ltd* [2017] NZHC 2901 (Collins J). See also the contract case, *L&M Coal Holdings Limited v Bathurst Resources Limited* [2018] NZHC 2127 (Dobson J) at [197] and [202] and a case on the power of an airline to refuse to carry a person: *Sharma v Air New Zealand Ltd* [2020] NZHC 230 (Paul Davison J).

79 *FWD Life Insurance Co (Bermuda) Ltd v Poon Cindy* [2019] HKCA 697 (Lam VP, Cheung and Chu JJA) at [34] and [35], *Chok Kin Ming v Equal Opportunities Commission* [2019] HKCFI 755, *Global Gaming Philippines LLC v Deutsche Bank AG, Hong Kong Branch* [2019] HKCFI 405 (Lisa Wong J), *Pa Sam Nang v The Hongkong and Shanghai Banking Corporation Ltd* [2016] HKCFI 409 (Deputy High Court Judge Paul Lam SC) and briefly in *Invest Gain Ltd v Novel Good Ltd* [2019] HKCFI 1633 (B Chu J).

80 *Williamson v Port Authority of Jamaica* [2019] JMCA Civ 8, (2019) 94 WIR 466.

81 *Fiji Times Ltd v Solicitor General* [2016] FJHC 548.

82 *Platt v OBH Luxury Accommodation Ltd* [2015] IEHC 793.

83 *IBM United Kingdom Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] IRLR 4, [2018] Pens LR 1. Allowing an appeal from the decisions of Warren J [2014] EWHC 980 (Ch) and [2015] EWHC 389 (Ch).

British Airways

The *British Airways case*[84] in 2018 also involved an occupational pension scheme (called Airways Pension Scheme or APS). In this case the trustee board[85] was exercising a unilateral amendment power under the trust deed to confer on it a discretion to grant pension increases, which power it then proposed (having taken advice, including legal and actuarial advice) to use. The employer sought to challenge and set aside these decisions by the trustee board on various grounds, including on the basis that they were made for an improper purpose and with inadequate deliberation (ie in effect the first limb of the *Braganza/Wednesbury* tests, although neither of these cases is mentioned in any of the judgments).

At first instance, Morgan J rejected the claims, but the employer appealed on the proper purpose ground (but not the relevant factors ground). The Court of Appeal (by a majority) upheld the appeal, holding that the power was being exercised for an improper purpose.[86]
At first instance in *British Airways*,[87] Morgan J referred to various of the trustee challenge cases, including *Dundee General Hospitals*,[88] *Scott v National Trust*,[89] *Edge v Pensions Ombudsman*[90] and *Pitt v Holt*.[91] The employer in *British Airways* sought to challenge the decision-making process as being pre-determined,[92] not taking into account all relevant considerations and taking into account some irrelevant considerations. A challenge based on the decisions being irrational and perverse was not ultimately pursued.[93]

Papers on Braganza

There have been a number of useful papers[94] on *Braganza*, but mainly focusing on its application outside trusts or pensions.

Lord Sales has recently commented[95] (extra-judicially) that he is 'critical of attempts to use the *Wednesbury* decision as an appropriate model, for which there appears to be something of a vogue at the moment'. But this seems to be in the context of its application to contractual

84 *British Airways PLC v Airways Pension Scheme Trustee Ltd* [2018] EWCA Civ 1533, [2018] Pens LR 19, Lewison and Peter Jackson LJJ (Patten LJ dissenting), overturning Morgan J at first instance: *British Airways PLC v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch), [2017] Pens LR 16. Leave was given to appeal to the Supreme Court, but this case later settled: *Airways Pension Scheme Trustee Ltd v Fielder* [2019] EWHC 3027 and 3032 (Ch) (Zacaroli J).

85 Originally individual trustees, but these were replaced by a trustee company (with the individual trustees as directors) during the course of the litigation. Nothing turned on this.

86 Morgan J's decision on the relevant factors challenge to the decision of the trustee board was not appealed: Patten LJ at [31].

87 *British Airways PLC v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch), [2017] Pens LR 16 (Morgan J) (at [482] on).

88 *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896, HL.

89 *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (Robert Walker J) at 717.

90 [2000] Ch 602, CA.

91 [2013] UKSC 26, [2013] 2 AC 108.

92 [2017] EWHC 1191 (Ch) at [494].

93 *Ibid*, at [630].

94 See, eg Michael Bridge, 'The exercise of contractual discretion' (2019) 135 LQR 227; Ernest Lim and Cora Chan, 'Problems with Wednesbury Unreasonableness in Contract Law: Lessons from Public Law' (2019) 135 LQR 88; Jason Varuhas, 'Judicial Review beyond Administrative Law: Braganza v BP Shipping Ltd and Review of Contractual Discretions' UK Const L Blog (31 May 2017); Peter Susman, 'Braganza and beyond: judicial review of the exercise of contractual discretion in private law' (2017) 5 JIBFL 280; Wayne Courtney, 'Reasonableness in contractual decision-making' (2015) 131 LQR 552; David Foxton, 'A good faith goodbye? Good faith obligations and contractual termination rights' (2017) LMCLQ 360 and the paper by David Foxton of his talk in January 2018 to the Attorney General's Chambers, Singapore, on 'Controlling contractual discretions'.

95 Philp Sales, 'Use of powers for proper purposes in private law' (2020) 136 LQR 384.

discretions (rather than those under trusts). He points to the use of proper purposes (fraud on a power) and interpretation as potential public law analogies. This does not seem to divert from the principles outlined in this article in relation to trustees (who will be subject to those concepts as well).

One incredibly useful (but fortuitous) feature of the *Braganza* decision is that it makes later cases citing it very easy to find using a simple word search.

Braganza: the decision

The *Braganza*[96] case is a key decision of the Supreme Court looking at a challenge to a contractual determination, in that case involving a decision made by an employer about how an employee had died (and hence whether or not a lump sum death benefit was payable under the employment contract). The five members of the Supreme Court in the case unanimously agreed that it was appropriate to use the public law *Wednesbury* test when deciding whether or not a decision by the employer, BP, was challengeable.

However, when applying that test to the actual facts of the case, the Supreme Court split:

(a) three of the judges held that the decision was should be overturned on the basis of a failure to comply with the first limb (consideration of relevant factors): Lady Hale, Lord Hodge and Lord Kerr;
(b) the minority (Lord Neuberger and Lord Wilson) applied the same legal test but would have decided that the decision should not be overturned.

This meant that of the nine judges who heard the case, five of them (two in the Supreme Court and three in the Court of Appeal) would have upheld BP's decision and only four (three in the Supreme Court and Teare J at first instance) decided to overturn it. However, because the majority in the Supreme Court held that it should be overturned, the views of the four judges prevailed.

Facts in Braganza

Mr Braganza, the chief engineer on board a ship, *MV British Unity*, was lost at sea one night. He simply went missing. The ship turned around when it was noticed that he was no longer there but could not find him. On reaching port, a report was commissioned by BP to try and find out what had happened to Mr Braganza.

Mr Braganza's employment contract included a specific lump-sum death in service benefit payable by his employer, BP.[97] However, the contract expressly provided in clause 7.6.3[98] that the lump sum:

> 'shall 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 whether at sea or ashore …'

96 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 4 All ER 639, [2015] 1 WLR 1661. Noted by Wayne Courtney, 'Reasonableness in contractual decision-making' (2015) 131 LQR 552.

97 In fact, this was the second defendant, BP Maritime Services (Singapore) Pte Ltd. The first defendant, BP Shipping Ltd, was the owner of the ship: Lady Hale at [11]. In practice the case proceeded on the basis that there was no distinction between them: Teare J [2012] EWHC 1423 (Comm) at [1] and in the SC, Lord Hodge [2015] UKSC 17 at [45].

98 See Lady Hale at [1].

It is noticeable that this is not a pure general discretion as to whether or not to pay the death benefit. Instead the death benefit is payable unless BP reaches the relevant factual decision. This can be seen as having an impact on the ultimate decision in the case – it seems tantamount to mean that BP had the onus to show that the death resulted from a wilful act.[99]

In light of the report, BP concluded that Mr Braganza had indeed committed suicide and so no lump-sum was payable. Mr Braganza's wife brought a claim in tort against BP in negligence (under the Fatal Accidents Act 1976) and (presumably as Mr Braganza's executor) under the contract for the payment of the death lump sum.

(a) The negligence claim was dismissed by Teare J at first instance, but he upheld the contractual lump sum claim.
(b) BP appealed and the Court of Appeal (unanimously) allowed the appeal and upheld BP's decision on the lump sum.

Braganza in the Supreme Court

Mrs Braganza appealed to the Supreme Court which allowed her appeal (by a three-two majority), holding:

(a) (unanimously) the public law *Wednesbury* test should apply (in both limbs); and
(b) (by a majority) three (Lady Hale, Lord Hodge and Lord Kerr) to two (Lord Neuberger and Lord Wilson): applying this test, BP had acted irrationally (under the first limb of *Wednesbury*) in reaching its decision. It had not considered all relevant factors. Mr Braganza was a Roman Catholic, so this meant suicide was more unlikely.

BP's decision was not considered to be irrational under the second *Wednesbury* limb based on the outcome, ie it was not considered to be one that no reasonable decision-maker could have reached: Lady Hale at [42].[100] Nor was it challenged as having been made for an improper purpose.

Lord Kerr agreed with Lord Hodge, who agreed[101] with the bulk of Lady Hale's judgment from [18] to [31] and that there had to be cogent evidence of suicide.[102] Lord Hodge went on to discuss in more detail the implication of this being a discretion in a contract of employment, ultimately concluding (at [63]) that, although BP had acted in good faith and not unfairly, 'I do not think that the report of the investigation team gave [the BP decision maker] the evidential basis for forming the positive opinion that Mr Braganza had committed suicide'.

BP had already conceded that, if its decision was overturned, then the lump sum would be paid. This, in effect, meant that there was no question of the Supreme Court (or the earlier courts) referring the decision back to BP itself to redecide the question based on the proper test: see Lady Hale at [14] referring to Teare J at first instance at [23]. See chapter 68 for a discussion of this point.

99 Lady Hale at [14], citing Teare J at first instance at [93] and at [37].
100 Perhaps just as well given that five judges (three in the Court of Appeal and two in the Supreme Court) would have upheld the decision. Described on this point as 'reassuring' by David Foxton, 'A good faith goodbye? Good faith obligations and contractual termination rights' (2017) LMCLQ 360 at 368, n 64.
101 Lord Hodge at [52] and [53].
102 Lord Hodge at [61], referring to Lady Hale at [36].

The Braganza rationality test

The finding in *Braganza* was that the decision in that case must be exercised rationally (and consistent with its contractual purpose). Rational in the public law (*Wednesbury*) sense has the two limbs previously mentioned – process and outcome.[103]

The Supreme Court was clear that the Court is not substituting its own decision on what is reasonable.[104] Thus Lady Hale at [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 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.'

This use of the two-limb test is not new in private law, but until *Braganza* the use of the public law test in relation to a private law instrument had not been expressly approved in these terms by the Supreme Court.[105] The express application in *Braganza* of the public law *Wednesbury* concepts looks to be directly contrary to the reservations expressed two years earlier in *Pitt v Holt* on their use in relation to trustee discretions.

In 2008 in *Socimer International Bank Ltd v Standard Bank London Ltd*[106] (a case involving a challenge to a bank's valuation of securities on a default under a forward sale contract), Rix LJ had summarised the position (at [66]):

> '[A] decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to *Wednesbury* unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time.'

Rix LJ went on to draw a distinction with purely objective reasonableness:

> 'In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria. … Laws LJ in the course of argument put the

103 *Braganza*: Lady Hale at [24] and [30], Lord Neuberger at [103].

104 Although on the facts and the 3-2 split on application of the public law *Wednesbury* test, the final decision came close to doing just that.

105 Although equivalent concepts of rationality had been mentioned in various cases, eg trustees in *McPhail v Doulton* [1971] AC 424 per Lord Wilberforce at 449C and employers in *UC Rusal Alumina v Miller* [2014] UKPC 39 at [51] and [55].

106 [2008] EWCA Civ 116, [2008] Bus LR 1304, [2008] 1 Lloyd's Rep 558.

> matter accurately, if I may respectfully agree, when he said that pursuant to the *Wednesbury* rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision-maker becomes the court itself.'

This summary by Rix LJ in *Socimer* was cited in *Braganza*, by Lady Hale at [22] and Lord Neuberger at [102].

In the public law area, the classic principle was that laid down in *Wednesbury*[107] by Lord Greene MR:

> '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'.

Thus, as already mentioned, there are two limbs of *Wednesbury* unreasonableness (see Lady Hale at [24]), which can be flagged as being 'process' and 'outcome':

(1) *Process*: 'The first limb focusses on the decision-making process – whether the right matters have been taken into account in reaching the decision.'
(2) *Outcome*: 'The second focusses upon its 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.

Lady Hale commented (at [24] that the outcome limb is 'often used as a shorthand for the *Wednesbury* principle, but without necessarily excluding the [process limb]'.

Lady Hale continued at [30]:

> 'For my part, I would include both limbs of the *Wednesbury* formulation in the rationality test. Indeed, I understand Lord Neuberger (at para 103 of his judgment) and I to be agreed as to the nature of the test.'

Trustee cases on Wednesbury/Braganza type review

Many trustee cases[108] before *Braganza* had raised the principles, seemingly similar to that applicable in public law under *Wednesbury*, that trustees should comply with both limbs of the test. They:

- 'must take into account all relevant but no irrelevant factors'; and
- must not reach a decision that no reasonable trustee would make.

107 *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, CA per Lord Greene MR at 233 and 234. An unreserved judgment.

108 See generally *Thomas on Powers*, (2nd edn) (Oxford University Press, 2012) at [10.75] to [10.145], although note that this book predates the decisions of the Supreme Court in both *Pitt v Holt* and in *Braganza*. It does however refer to the decision of the Court of Appeal in *Pitt v Holt*.

On the relevant factors limb (effectively *Braganza 1*), this is the effect of the whole line of cases based on the rule in *Re Hastings-Bass*,[109] culminating in the 2013 decision of the Supreme Court in *Pitt v Holt*.[110] Effectively this rule looked at setting aside a decision made by trustees because they had not considered properly a relevant matter (eg tax). *Pitt v Holt* and its inter-relation with *Braganza* is looked at below.

In 1991 in *Stannard v Fisons Pensions Trust Ltd*[111] the Court of Appeal upheld the overturning of a decision by pension trustees about the amount of a bulk transfer payment to another scheme. The decision was overturned because they had not considered the increase in value of the fund over the interim since the relevant valuation. They had not given 'properly informed consideration' to the discretion they had to exercise.[112]

In a pensions case in 1993 concerning an ill-health retirement, *Harris v Lord Shuttleworth*,[113] Glidewell LJ approved the reasoning of Judge Moseley QC at first instance[114] and held that trustees 'must not arrive at a perverse decision, ie a decision to which no reasonable body of trustees could arrive, and they must take into account all relevant but no irrelevant factors.'

The two-limb approach was applied by Scott V-C at first instance[115] and by Chadwick LJ in the Court of Appeal in *Edge v Pensions Ombudsman*.[116] Scott V-C held (at p 534B):

> 'It is the trustees' discretion that is to be exercised. Except in a case in which the discretion has been surrendered to the court, it is not for a judge to exercise the discretion. The judge may disagree with the manner in which trustees have exercised their discretion but, unless they can be seen to have taken into account irrelevant, improper or irrational factors, or unless their decision can be said to be one that no reasonable body of trustees properly directing themselves could have reached, the judge cannot interfere.'

Later in *Edge*, dismissing the appeal, Chadwick LJ cited (at p627) the passage above from Glidewell LJ in *Harris* and held (at p631) that on the facts in *Edge*: 'The decision cannot be challenged on the ground of manifest irrationality.' Chadwick LJ continued (at p 633) that 'the trustees' decision can be set aside if it can be shown that they failed to consider matters which were relevant, or took into account matters which were irrelevant.'

Court approval of momentous decisions

A similar approach applies where the court is asked by trustees to approve a 'particularly momentous' decision. The court will check if 'the trustee has taken into account irrelevant improper or irrational factors or whether it has reached a decision that no reasonable body of trustees properly

109 *Re Hastings-Bass* [1975] Ch 25, CA.

110 [2013] UKSC 26, [2013] 2 AC 108.

111 *Stannard v Fisons Pension Trust Ltd* [1992] IRLR 27, [1991] PLR 225, CA. Lord Walker commented on this decision in *Pitt v Holt* at [34], noting that the scale of the change is crucial.

112 Dillon LJ at [37], having cited Fox LJ in *Kerr v British Leyland* (1986).

113 [1994] ICR 991, [1995] OPLR 79, CA per Glidewell LJ at 999G. Followed in Australia in a unit trust case, *Ying Mui Pty Ltd v Frank Kiang Ngan Hoh (No 6)* [2017] VSC 730 (Vickery J) at [408].

114 *Harris v Lord Shuttleworth* [1992] OPLR 151 (Judge Moseley QC) at 159, citing Denning LJ in the valuation case, *Dean v Prince* [1954] Ch 409 at 418.

115 *Edge v Pensions Ombudsman* [1998] Ch 512 (Scott V-C). Cited by the Singapore Court of Appeal in *Foo v Foo* [2012] SGCA 41, [2012] 4 SLR 339 at [59], going on to comment at [61] that the danger of an extension of public law considerations into the duties of trustees 'could be many-fold'.

116 *Edge v Pensions Ombudsman* [2000] Ch 602, CA. On a perversity or 'no reasonable trustee test, see, eg Warren J in *PNPF Trust Co Ltd v Taylor* [2010] All ER (D) 251 (Jun) at [684] (a comment about the power of the Pensions Regulator to review a funding decision by pension trustees), *Independent Schools Council v Charity Commission* [2012] 1 All ER 127

directing themselves could have reached.' (Per Blackburne J in *Merchant Navy Ratings Pension Fund Trustees Ltd v Chambers*,[117] citing Scott V-C and the Court of Appeal in *Edge*.) This is obviously referring to the same tests as apply for review (rather than validation) of a decision.

Administrative or dispositive powers?

It is sometimes commented that any due consideration/relevant factors review (*Braganza 1* or formerly *Hastings-Bass*) of decisions by trustees only applies to dispositive powers, but not to administrative powers.[118] However, this seems an unnecessary distinction (the cases pre-date *Braganza*).

Another example is the Bermudan decision *In Re A Trusts*[119] where counsel (Mr Singla QC) argued that the Court should also ask the question:

> 'Whether it can be said that in reaching its decision to implement the proposal the trustee has taken into account irrelevant, improper or irrational factors or whether it has reached a decision that no reasonable body of trustees properly directing themselves could have reached.'

Kawaley CJ accepted that the additional question was part of the inquiry whether the decision would have been reached by a reasonable body of trustees.

There are comments that different rules may apply if trustees ask the court to approve a major decision, eg *MNRPF*,[120] but even this is moving towards applying *Braganza* style rationality tests: *Airways Pension Scheme Trustee Ltd v Fielder.*[121]

Public law analogies with trustee duties before Pitt v Holt

In 1993, in *Harris v Lord Shuttleworth*[122] the Court of Appeal adopted a no perversity and relevant factors test for trustees. Cases after *Harris* went on to expressly make the connection with the

at [220] (Decisions of charity trustees) (approved by the Court of Appeal in *Children's Investment Foundation Fund (UK) v Attorney General* [2018] EWCA Civ 1605, [2019] Ch 139 at [61]) and *Thales UK Ltd v Thales Pension Trustees Ltd* [2017] EWHC 666 (Ch), [2017] Pens LR 15 (Warren J) at [152] (choice of index by trustees).

117 [2002] ICR 359, [2001] OPLR 321, [2001] PLR 137 (Blackburne J) at [7]. Applied by Asplin J in *Merchant Navy Ratings Pension Fund Trustees v Stena Line* [2015] EWHC 448 (Ch), [2015] PLR 239 at [16] and [161]. Similarly, David Richards J in *Re MF Global UK Limited* [2014] EWHC 2222 (Ch) at [32].

118 Eg, *Re Duxbury's ST* [1995] 1 WLR 425, CA at 427–28 (Rattee J at first instance had held rule does not apply to statutory power to appoint new trustees); and *Donaldson v Smith* [2006] EWHC B9 (Ch), [2006] All ER (D) 293 (May), [2007] WTLR 421 (David Donaldson QC) (rule does not apply to power to enter contract of sale or lease with third parties). Cited in J Hudson and C Mitchell, 'Legal Consequences of the Flawed Exercise of Pension Scheme Powers' in C Mitchell, S Agnew and P Davies (eds), *Pensions: Law, Policy and Practice* (Hart Publishing, 2020 – forthcoming) at n 10, but also noting that Cayman and Jersey courts have taken a broader view of the rule's application: *Barclays Private Bank and Trust (Cayman) Ltd v Chamberlain* (2005) 9 ITELR 302; *Re Howe Family No 1 Trust* [2007] JRC 248, [2009] WTLR 419.

119 [2018] SC (Bda) 42 Civ, Berm SC. Followed in *Re R Trust* [2019] SC (Bda) 36 Civ (Hargun CJ) at [25].

120 *Re Merchant Navy Ratings Pension Fund; Merchant Navy Ratings Pension Trustees Ltd v Stena Line* Ltd [2015] EWHC 448 (Ch), [2015] Pens LR 239 (Asplin J). Citing *Public Trustee v Cooper* [2001] WTLR 901 (Hart J) and *Cotton & Moore v Earl of Cardigan* [2014] EWCA Civ 1312, [2015] WTLR 39.

121 *Airways Pension Scheme Trustee Ltd v Fielder* [2019] EWHC 3027 (Ch) (Zacaroli J) at [5], citing *MF Global UK Ltd* [2014] EWHC 2222 (Ch) (David Richards J). This applies even if relevant litigation has previously been authorised by a court order under the Beddoes jurisdiction: *Airways Pension Scheme Trustee Ltd v Fielde*r [2019] EWHC 3032 (Ch) (Zacaroli J) at [20].

122 [1994] ICR 991, [1995] OPLR 79, CA per Glidewell LJ at 999G. Followed in Australia in a unit trust case, *Ying Mui Pty Ltd v Frank Kiang Ngan Hoh (No 6)* [2017] VSC 730 (Vickery J) at [408].

public law tests in *Wednesbury*. In 1996, in another pensions case, *Wild v Pensions Ombudsman*,[123] the comments in *Harris* were adopted and followed by Carnwath J (as he then was) observing that, to a public lawyer, those words were virtually identical to the *Wednesbury* principles.

And later, in 1999, in the pensions case *Edge v The Pensions Ombudsman*,[124] the Court of Appeal adopted a public law analogy with enthusiasm (including because of the reasons for entrusting decisions to the relevant decision makers: *Edge* at 630).[125]

Pitt v Holt and public law analogies

However, this was followed later by a marked caution in some of the family trust cases. Thus, Lord Walker in *Pitt v Holt*[126] considered that the 'analogy cannot … be pushed too far', holding at [11]:

> '[11] There are superficial similarities between what the law requires of trustees in their decision-making and what it requires of decision-makers in the field of public law. This was noted by the Court of Appeal in its judgment, delivered by Chadwick LJ, in *Edge v Pensions Ombudsman* [2000] Ch 602 at 628–629. It was also noted by Lord Woolf MR in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 at para 20. The analogy cannot however be pressed too far. Indeed it was expressly disapproved by the Court of Appeal in these appeals (Lloyd LJ at [77] and Mummery LJ at [235]). In *Re Barr's Settlement Trusts, Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409 at [29], Lightman J identified three important differences as the discretionary nature of relief on judicial review, a different approach to nullity, and strict time limits.'

In the Court of Appeal,[127] Lloyd LJ had said:

> '[77] … For my part, I would wish to discourage reference to such public law principles in relation to trust law, since trust law has plenty of satisfactory means of dealing with the issues that arise under trusts, and those issues are inherently different from those arising in public law.'

And Mummery LJ had held:

> '[235] … analogies with judicial review in public law are unhelpful and unnecessary. There is an elementary distinction between, on the one hand, the liability in private law of a fiduciary for breach of duty and, on the other hand, the availability of judicial review for the control of abuses of public power.'

123 [1996] OPLR 129 (Carnwath J) at 135. Cited by Chadwick LJ in *Edge* (below) at 628. See also *Telstra Super Pty Ltd v Flegeltaub* [2000] VSCA 180, 2 VR 276 per Batt JA at [33] noting that 'a decision of a superannuation fund trustee … is different in kind from, and arises in a context different from that of, the exercise of a discretion by a trustee of a trust for bounty or charity.'

124 [2000] Ch 602, CA per Chadwick LJ at 627–630. Cited on this in later cases, including *Merchant Navy Ratings Pension Fund Trustees Ltd v Chambers* [2002] ICR 359, [2001] OPLR 321, [2001] PLR 137 (Blackburne J) at [7] and *Merchant Navy Ratings Pension Fund Trustees v Stena Line* [2015] EWHC 448 (Ch), [2015] PLR 239 (Asplin J) at [16] and [161].

125 See Jonathan Evans 'Challenging Trustee decisions' (2012) TLI 55. See also Newey J (extra-judicially) in Ch 2, 'Constraints on the exercise of trustees' powers' at pp 50 to 56 in PG Turner (ed), *Equity and Administration* (Cambridge University Press, 2016).

126 [2013] UKSC 26, [2013] 2 AC 108.

127 *Pitt v Holt* [2011] EWCA Civ 197; [2012] Ch 132.

Mummery LJ continued:

> 'There are surface similarities in the language of discretion and in the debates about the limits of discretionary power, but the contexts are so different that it is dangerous to develop the private law of fiduciaries by analogy with public law on curbing abuse of power. Judicial review in public law is concerned with the lawfulness of decisions and acts of public authorities to ensure that they are acting within the limits of a power usually set by statute. Breaches of duty in fiduciary law relate to discretionary dispositive powers privately entrusted to a fiduciary who has been selected to exercise the powers for the benefit of members within a designated class. The discretion of the fiduciary is not controlled by the court, which will not interfere with matters of judgment by the fiduciary. The only ground on which the court will review the exercise of the discretion is that of a breach of fiduciary duty. The underlying principles of fiduciary law and private property law are conceptually different from the public interest basis for reviewing the lawfulness of administrative action.'

In the Supreme Court, as cited above, Lord Walker referred to these comments in the Court of Appeal in *Pitt v Holt* on this point. But it is not clear if he was approving them or merely noting them. Lord Walker's comment about 'not pushing the analogy too far' could be seen as indicating that public law concepts can be appropriate in some contexts, but not in others. The earlier Court of Appeal decisions on pension trustees applying similar principles to *Wednesbury* (ie *Harris*[128] and *Edge*[129]) were not expressly over-ruled.

Jonathan Evans, in 'Challenging Trustee Decisions: Differing Approaches to the Supervision of the Exercise of Trustees' Powers',[130] reviewed the use of public law in a trust context (this was after the Court of Appeal decision in *Pitt v Holt*, but before the Supreme Court decision), in particular looking at whether the public law concepts of 'legitimate expectation' or 'reasonable expectation' could apply in a trust context.

Public law: Braganza and trustees

As previously mentioned, there was a clear warning away from applying public law in trustee cases by the Court of Appeal in *Pitt v Holt*, although slightly less clear by Lord Walker in the Supreme Court. But two years later in *Braganza*, the Supreme Court unanimously decided that the public law *Wednesbury* test (in both limbs) is the right one to apply in a private law context. In effect *Pitt v Holt* should be treated as impliedly overturned on this point by *Braganza*. There is no express overturning in *Braganza*, in which *Pitt v Holt* was not cited either by counsel or by the judgments (Lord Neuberger and Lady Hale did sit in both cases).

The decision in *Braganza* on this public law analogy is an incursion into the more wide-ranging comments against the use of a public law analogy in *Pitt v Holt* by Mummery LJ and Lord Walker. As mentioned above, the public law *Wednesbury* test analogy clearly applies by analogy to decisions of employers under pension schemes (*Braganza* and *IBM*). There seems little reason not to apply the same tests to decisions by trustees as well, in particular in relation to trustees of commercial trusts, such as pension schemes.

128 *Harris v Lord Shuttleworth* [1994] ICR 991, [1995] OPLR 79, CA.
129 *Edge v The Pensions Ombudsman* [2000] Ch 602, CA.
130 (2012) 26 TLI 55.

Wellington City Council

Braganza has been applied in New Zealand to the trustee of a commercial trust in *Wellington City Council v Local Government Mutual Funds Trustee Ltd*.[131] This involved a commercial trust under which local authorities contributed to a trust fund, called 'Riskpool', on the basis that the trustee had a discretion to use the funds to meet claims on the local authority for damages for 'water ingress' in buildings. Wellington Council made a claim and (several years later) the trustee rejected it.

On a challenge to that rejection, Collins J referred (at [167] and [170]) to *Braganza* and applied the irrationality test, holding that 'No material differences were identified between the claims based on breach of contract and those that alleged that [the trustee] had breached its fiduciary duties to the council.'

Other public law concepts?

It seems right to apply public law *Wednesbury* irrationality (in both limbs) to appropriate private law decisions as well, but that there may still need to be caution in the use of other public law concepts. For example, issues on voidness of decisions, who may claim, no implied 'natural justice' rule seem still not to be appropriate.

Mummery LJ's comments (in particular the last sentence cited above on the 'conceptual difference') in the Court of Appeal in *Pitt v Holt* seem to be wider and inconsistent with *Braganza* (which unanimously applied both limbs of '*Wednesbury* rationality' in a private law context).

It could perhaps be argued that *Braganza* (and the pubic law *Wednesbury* test) is limited to contractual discretions and not to family trusts (such as those involved in *Pitt v Holt*), leaving more commercial trusts (such a pension scheme or unit trust) still to be categorised. But *Braganza* has already been treated as applying in many commercial contexts[132] and, given the existing references to 'relevant factors' and 'no reasonable trustee' in many previous trust cases, it seems right that *Braganza* will be applied to trustee decisions as well.

It is also noticeable that the three 'important differences' noted by Lightman J in *Barr*[133] and cited by Lord Walker in *Pitt v Holt*, namely 'the discretionary nature of relief on judicial review, a different approach to nullity, and strict time limits' are all procedural differences and do not relate to the substantive review of the relevant decision.

Pitt v Holt compared with Braganza

It is difficult to see how *Pitt v Holt* and *Braganza*, the two recent Supreme Court decisions on review of the exercise of discretions in a private law context, link with each other. Both involve a review by the court of a decision made by a decision maker under the powers given under the relevant instrument. In the case of *Pitt v Holt* this was a decision by fiduciaries (trustees and a receiver) and, in the decision, two years later, in *Braganza* this was a factual decision by the employer.

131 [2017] NZHC 2901 (Collins J).

132 See Ch 44 in Pollard, *Pensions, Trusts and Contracts*.

133 *In Re Barr's Settlement Trusts, Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409 (Lightman J) at [29]. A cautious approach to the use of public law analogies was stated in Singapore in the private trust case *Foo v Foo* [2012] SGCA 41, [2012] 4 SLR 339 at [64].

Unhelpfully, despite both cases dealing with a review of the exercise of a private law discretion, *Braganza* does not refer to the decision in *Pitt v Holt* (nor does it appear that the decision in *Pitt v Holt* was cited in argument).

To contrast the judgments in *Pitt v Holt* and *Braganza*:

	Pitt v Holt (2013)	**Braganza (2015)**
Court	Supreme Court	Supreme Court
Majority	7-0	5-0 (Law) 3-2 (Application to facts)
Judges in common	Lord Neuberger and Lady Hale in majority	Lady Hale in majority, Lord Neuberger dissenting
Nature of claim	Claim to avoid decision	Money claim
Type of arrangement	Trust	Contract
Family or commercial?	Family trust (Not a pension trust)	Employment contract: Death benefit on death of employee
Type of discretion or decision	Wide discretion	Factual decision
Original court	Chancery Division	Queen's Bench Division
Case decided on:	Relevant factors test	Relevant factors limb
Real defendant?	HMRC	Not a tax issue
Applying public law test?	Similarities were 'superficial' and 'analogy cannot … be pressed too far'	Public law *Wednesbury* test is appropriate

Trustees: what was the decision in Pitt v Holt?

In *Pitt v Holt*[134] at [73] (see above) Lord Walker, giving the only judgment, clearly held two matters:

(a) a decision by the fiduciaries in those cases could not be overturned on the basis of a failure to carry out proper consideration (ie the so-called *Hastings-Bass* basis, corresponding with the first limb in *Wednesbury/Braganza)*, unless there was a breach of 'fiduciary duty' by the trustees – see [73]; and
(b) in the cases concerned, the trustees had taken apparently competent professional advice and so they were not in breach of a relevant duty – see [80] and so the decisions would not be overturned (at least on this basis[135]).

This can be quite tricky to analyse. But it seems to lead to three questions when considering *Pitt v Holt* on this point (and how it interacts with the later decision in *Braganza*):

(1) That there is potentially a different test for trustees (or other fiduciaries) than on others (eg employers).

134 [2013] UKSC 26, [2013] 2 AC 108 at [88].
135 In one of the two cases in *Pitt v Holt*, the decision was overturned on the basis of 'mistake'. This is not considered further in this article.

(2) That the requirements in *Pitt v Holt* for a breach of 'fiduciary duty':

   (i) only apply where a decision is being sought to be overturned (rather than, say, where damages are being sought); and
   (ii) are using the term 'fiduciary duty' in a wide sense (not the narrow or 'full' sense envisaged by Millett LJ in *Mothew*[136]).

(3) That the *Hastings-Bass/Wednesbury/Braganza* duty as applied to trustees to 'consider all relevant factors' is modified by a reasonableness component to be in reality a duty *to take reasonable care* to consider all relevant factors – so forming part of the trustee's duty of care or 'proper deliberation'.[137] This would mean that if the trustee obtains 'apparently competent professional advice' then this means that either:

   (i) the trustee is not in breach of this modified duty at all; or alternatively
   (ii) the trustee could still be in breach of the general duty of care or proper deliberation, but, given the advice and that the trustee has in some sense acted reasonably, this is not enough to amount to a sufficiently serious breach or a breach of fiduciary duty so as to mean that the decision would be overturned by the court. There are echoes of this analysis in the judgments in the liquidator case, *Top Brands*[138] and the director case, *Carlyle*.[139]

Looking further at the first two points in turn.

Trustees and employers are different?

There are clearly a number of distinctions between the two cases, *Braganza* and *Pitt v Holt*. The *Braganza* test should apply to trustees as well. The distinctions between *Braganza* and *Pitt v Holt* are not great enough so that *Braganza* should be seen (say) as not applying to trustees at all. There is no reason for the *Braganza* test to be restricted to contracts or non-fiduciaries (eg the decision makers in *IBM*).

It would be very odd to impose a standard of decision making on non-fiduciaries that is greater than that on trustees (and other fiduciaries). Accordingly:

(a) the *Braganza* test will apply to trustees of pension and other commercial trusts (indeed it has already been applied to the trustee of a commercial trust in New Zealand in *Wellington City Council*[140]).
(b) the *Braganza* test probably applies to help fix the level of 'proper deliberation' for other trustees as well. It could perhaps be argued that it imposes too great a burden on trustees of non-commercial trusts, but this is ultimately unlikely to succeed as a criticism. The *Braganza* tests are still fairly stiff, involving irrationality (more clearly seen in the second limb).

136 *Bristol and West Building Society v Mothew* [1998] Ch 1, CA per Millett LJ at 17.
137 See further on this Chs 47 to 49 in Pollard, *Pensions, Trusts and Contracts*.
138 *Top Brands Ltd v Sharma* [2014] EWHC 2753 (Ch), [2015] 2 All ER 581 (HHJ Barker).
139 *Carlyle Capital Corporation Ltd v Roberts* (2017) 4 September, Guernsey Judgment 38/2017 (Hazel Marshall QC, Lieutenant Bailiff).
140 *Wellington City Council v Local Government Mutual Funds Trustee Ltd* [2017] NZHC 2901 (Collins J).

Need for a breach of 'fiduciary duty'?

The judgments in *Pitt v Holt* are clear about the need for a breach of 'fiduciary duty' in order for a trustee (or other fiduciary) decision to be overturned.[141] Conversely, of course, in *Braganza* there is no suggestion of any need for a breach of duty or fiduciary duty.

The limit on overturning a decision was imposed in *Pitt v Holt* to reduce the scope of the 'get out of jail free'[142] aspect of the decision in *Re Hastings-Bass*[143] – namely that trustees (and other fiduciaries) were able to reverse their decision because the ultimate outcome turned out to be not what was intended.

It may be that, in context, this requirement in *Pitt v Holt* for a breach of fiduciary duty:

(a) only applies where a decision is being sought to be overturned (rather than, say, where damages or compensation are being sought); or
(b) is using the term 'fiduciary duty' in a wide sense (not the narrow or 'peculiarly fiduciary' sense envisaged by Millett LJ in *Mothew*[144]).

This is not at all clear from the judgments in *Pitt v Holt*.

On (a), whether the *Pitt v Holt* principles only apply to a claim to overturn the relevant decision, the context of the claims in *Pitt v Holt* was just such a claim. They were not claims against the trustees for damages (or equitable compensation) for breach of duty (or for an account). And the language of the judgments in *Pitt v Holt* is often clear that the judges concerned are looking at the position on an overturning of a decision.

(i) It could well be that the references in *Pitt v Holt* to a need for a breach of fiduciary duty are doing nothing more that emphasising that overturning a decision needs to be on the basis of a material (and not minor) breach of a relevant duty (or test) by the trustees concerned.
(ii) It can perhaps be seen as similar to the test in contract law allowing a contract to be terminated for breach only if there is a substantial breach (ie a breach of a condition), leaving damages claims available for lesser breaches (eg a breach of warranty).

On (b) above, the nature of the fiduciary duty involved, the term 'fiduciary duty' is giving rise to many problems, owing to a difficulty in working out what is a fiduciary duty and what is not. The Law Commission commented in 2014:[145] 'the term "fiduciary duty" means different things to lawyers and non-lawyers. Even lawyers use the term in different ways. In part, this reflects changes in judicial thinking about what the term means.'[146]

In *Mothew*,[147] Millett LJ famously held that fiduciaries will owe both fiduciary duties and non-fiduciary duties and that only those duties that are peculiar to fiduciaries are properly

141 *Pitt v Holt* [2013] UKSC 26 at [73]. The need for a breach of 'fiduciary duty' is repeated in the Privy Council's summary of the principles in *Pitt v Holt* in *Gany Holdings (PTC) SA v Khan* [2018] UKPC 21 per Lord Briggs at [54].
142 See Richard Nolan 'Controlling Fiduciary Power' [1993] CLJ 293 at 307.
143 [1975] Ch 25, CA.
144 *Bristol and West Building Society v Mothew* [1998] Ch 1, CA per Millett LJ at 17.
145 'Fiduciary duties of investment intermediaries' (Law Com no 350) at 3.11.
146 *Aequitas v AEFC* [2001] NSWSC 14 at [283].
147 *Bristol and West Building Society v Mothew* [1998] Ch 1, CA per Millett LJ at 16. See Sarah Worthington, 'Four Fiduciary Duties' (2018) 32 TLI 22 at 28 to 32 and Peter Birks, 'The Content of Fiduciary Obligation' (2002) 16 TLI 34 at 35.

termed fiduciary duties. It follows that not every breach of duty by a fiduciary is a breach of fiduciary duty. Millett LJ noted (at p 16):

> 'This branch of the law has been bedevilled by unthinking resort to verbal formulae. It is therefore necessary to begin by defining one's terms. The expression 'fiduciary duty' is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility.'

The due consideration of the relevant factors rule does not look to be 'peculiarly fiduciary' under this test.[148] But the duty of due consideration was itself described as fiduciary by the Court of Appeal in *Pitt v Holt*.[149] The Law Commission commented[150] in 2014 on this point in *Pitt v Holt*:

> 'In this context, however, the term is being used broadly and encompasses duties other than those which are "peculiarly fiduciary", such as the rules prohibiting unauthorised conflicts of duty and interest and the rule prohibiting unauthorised profits. Here the term means "the duties incumbent on a fiduciary to perform his office": R Nolan and A Cloherty, 'The rule in Pitt v Holt?' (2011) 127 Law Quarterly Review 499 at 501.'

Later commentators (including Lord Walker himself[151]) have taken a similar view that a breach of the full 'peculiarly' fiduciary duty (as defined in *Mothew*) is not needed.[152]

(a) It is unclear what the term 'fiduciary duty' means in the context of powers of a trustee board. Sometimes the courts categorise duties as being fiduciary, but the Court of Appeal in *Mothew*[153] made the point that not all powers owed by a fiduciary (such as a trustee) are fiduciary powers.
(b) It presumably includes acting where there is a conflict of interest, but it is not clear if it includes (say) acting without due care. In some categorisations a duty of skill and care (including a duty of due consideration) would not be considered to be a fiduciary duty in the full 'peculiarly' fiduciary sense.

148 Before *Pitt v Holt*, see Richard Nolan, 'Controlling fiduciary power' [2009] CLJ 293 at 309, citing *Permanent Building Society v Wheeler* (1994) 14 ACSR 109 (Ipp J) at 157–158; *Colin Gwyer & Associates Ltd v London Wharf* [2002] EWHC 2748 (Ch) (Leslie Kosmin QC) at [83] and *Extrasure Travel v Scattergood* [2002] EWHC 3093 (Ch) (Jonathan Crow QC) at [87]–[90].

149 *Pitt v Holt* [2011] EWCA Civ 197 at [127].

150 'Fiduciary duties of investment intermediaries' (Law Com no 350) at 3.64.

151 Lord Walker 'The changing face of trust law' (2017) 31 TLI 19 at 25; Lord Walker 'When will the Court grant relief for trustee's mistakes?' (2014) 44 HKLJ 760 at 765.

152 See, eg Dyson Heydon, 'Modern fiduciary liability: the sick man of equity?' (2014) 20 T&T 1006; Kelvin Low, 'Fiduciary duties: the case for prescription' (2016) 30 TLI 3, (extra judicially) in 'Constraints on the exercise of trustees' powers', Ch 2 in P G Turner (ed), *Equity and Administration* (Cambridge University Press, 2016), p 55 (note that the Supreme Court decision in *Braganza* was given after this chapter was written) and Michael Ashdown, *Trustee Decision Making* (Oxford University Press, 2015) at Ch 4, 'The nature of the *Hastings-Bass* duty'. For a discussion of the fiduciary duty concept in relation to making third parties liable, see P S Davies, *Accessory Liability* (Hart Publishing, 2015), p 99 and J Heydon, M Leeming and P Turner, *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies,* (5th edn) (LexisNexis, 2014), [5-355]–[5-430] (discussing in particular *Bell Group v Westpac (No 9)* (2012) 270 FLR 1).

153 *Bristol & West Building Society v Mothew* [1998] Ch 1, per Millett LJ at 16, 18.

(c) But it seems likely that *Pitt v Holt*[154] allows a trustee decision to be overturned even if it is not a full 'peculiarly' fiduciary duty that has been breached.[155]

(d) It may be relevant that the claim in *Pitt v Holt* was for reversal of the decision, and not for another remedy (eg damages). The logic here could be that overturning a decision involves a higher hurdle to be reached (so that the references in *Pitt v Holt* to the need for a breach of fiduciary duty[156] should be read with this in mind). This is not a point that is expressly made in the judgments in *Pitt v Holt*, but the whole context[157] of the case is a claim to reverse the relevant decision.

Where are we now?

The vast bulk of the case law applies both limbs of the *Braganza/Wednesbury* test to decisions of trustees. Clearly since *Braganza*, it is appropriate to apply such a public law test in relation to employer discretions in relation to death benefits in contracts and, since *IBM* to employer discretions under pension schemes. There seems little reason why a similar test should not apply to decisions by trustees as well. Indeed, it would be odd to have a lower standard applying to trustees as compared to employers.

The comments to the contrary in *Pitt v Holt*, both at the Court of Appeal and (somewhat elliptically) in the Supreme Court must be regarded as not applying given the clear contrary decision of the unanimous Supreme Court in *Braganza*. *Braganza* itself did not refer to *Pitt v Holt* but must be regarded as clarifying that some aspects of public law can indeed be applied in private law. This should apply to trustee decisions.

154 [2013] UKSC 26, [2013] 2 AC 108.

155 Lord Walker, 'The changing face of trust law' (2017) 31 TLI 19, the annual lecture given in November 2016 to ACTAPS (the Association of Contentious Trust and Probate Specialists).

156 See, eg the discussion in M Ashdown, *Trustee Decision Making: The rule in Re Hastings-Bass* (Oxford University Press, 2015) at 4.04 and by Newey J (extra judicially) in Ch 2, in 'Constraints on the exercise of trustees' powers', at p 54, in P G Turner (ed), *Equity and Administration* (Cambridge University Press, 2016).

157 On context being important, see Lord Steyn in *R v Secretary of State for the Home Office, ex p Daly* [2011] UKSC 42 at [59] 'In law, context is everything' and Lord Walker in *Bridge Trustees v Houldsworth* [2011] UKSC 26 at [32]: '… apparently wide propositions may have to be read in the context of the particular facts of the case to which they related'.