

Does absolute discretion mean absolute?

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The recent case of *UBS AG v Rose Capital Ventures Limited* [2018] EWHC 3137 (Ch) demonstrates that courts will not rush to imply terms into contracts where the drafting is clear.

Rose borrowed just over £20 million from UBS, secured on property. The loan was an on-demand loan for 5 years, subject to a condition that the bank could, in its "absolute discretion" on giving 3 months notice, require full repayment. The bank went on to serve notice and appointed receivers who began possession proceedings. The borrower claimed that the bank's discretion to call in the loan was not an unfettered right and the bank had acted in breach.

The Court considered whether there was an implied term that a discretion to call in a loan had to be exercised rationally (in accordance with *Braganza v BP Shipping Ltd* [2015] UKSC 17). A *Braganza duty* is a duty to act rationally where a party must exercise a contractual discretion in good faith and not arbitrarily. Such duties might arise in certain contracts where the parties do not have equal bargaining power so as to protect the weaker party against abuse of a contractual power (for example, employment contracts). A *Braganza duty* may also be relevant in certain contracts where the decision-maker has a role in the ongoing performance of the contract and has a clear conflict of interest. In this case there was found to be relative equality of bargaining strength. It would be difficult to argue that the exercise of the discretion by the bank was for the benefit of anyone other than the bank.

The Court ruled that the bank did not owe a *Braganza duty* to the borrower. There was no principle requiring the bank to give reasons for its decision to call in the loan. The borrower could not require the bank to justify its decision.

The lesson here for lenders is to ensure that absolute discretion clauses are drafted with clarity. Courts are unlikely to imply such a duty where the wording of the loan agreement is clear.

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