

3VB'S FINANCE COLUMN: WHO DECIDES IF I GET PAID?

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In this column, [Matthew Watson](#) and [Chinmayi Sharma](#) of 3 Verulam Buildings consider developments in the law of commission agreements and the remedies available to unpaid commission agents following the recent decision in *Horlick v Cavaco* [2022] EWHC 2935 (KB), in which Matthew and Chinmayi acted for the successful defendants.

by [Matthew Watson](#) and [Chinmayi Sharma](#) of 3 Verulam Buildings

If you are engaged to raise debt or equity finance, or find a buyer for a valuable asset, you are probably paid by your client on a commission basis. The risk in working on a commission basis is that, if the contemplated transaction does not proceed, you do not get paid. As a result, commission agents and those lawyers drafting commission contracts have often focused on defining precisely the 'transaction' that triggers the right to payment from the client.

But what if the commission agent does considerable work to bring about the transaction, only for the client to unreasonably or irrationally call the deal off at the last minute? There is no 'transaction'. Does that mean that the commission agent cannot get paid? Does the commission agent have a remedy? If not, what steps can the commission agent take to protect itself?

These are questions practitioners can now answer in light of the recent decision by Freedman J in *Horlick v Cavaco* [2022] EWHC 2935 (KB).

THE FACTS IN *HORLICK*

Pathfinder Moçambique SA had licences to mine heavy mineral sand deposits in Mozambique but needed finance to establish and operate the mines. It engaged Development Capital Limited (DCL) to advise on the raising of the project finance. In return for DCL's advice and assistance Pathfinder agreed to pay DCL a success fee in the event that a "Transaction" occurred. The "Transaction" was defined as an "equity fundraising of up to US\$30m for" Pathfinder.

For many years, the project struggled to raise finance. Ultimately, a funder called the Renova Group made an offer to provide the equity finance. Pathfinder turned it down. DCL contended that was irrational; the offer was a good one and no better offers had been received. DCL brought a claim for the success fee.

THE CONVENTIONAL ANALYSIS OF DCL'S CLAIM FOR PAYMENT

The conventional analysis says that DCL should get nothing. It was common ground that no "Transaction" occurred. Therefore, the condition precedent to its right to the success fee was not satisfied. At common law, where remuneration is conditional on an event, no remuneration is due until an event occurs (*Howard Houlder & Partners Ltd v Manx Isle Steamship Co* [1923] 1 KB 110).

Similarly, although DCL had undoubtedly done work under the engagement, no claim in unjust enrichment for the value of work done exists where there is an unfulfilled conditional contractual right to payment, particularly in light of the Supreme Court's recent decision in *Barton v Morris* [2023] UKSC 3; [2023] 2 WLR 269.

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DCL'S NOVEL LEGAL CLAIM

DCL therefore had to advance a novel legal argument. DCL argued that Pathfinder's decision whether to accept or reject offers was subject to an implied term, commonly called a 'Braganza' duty (after the Supreme Court's decision in *Braganza v BP Shipping Ltd [2015] UKSC 17*). The implied term is that one party must exercise a contractual discretion rationally where the exercise of that discretion will affect the other party. If that discretion is exercised irrationally, it may form the basis for a claim for a breach of contract.

DCL contended that Pathfinder breached the *Braganza* duty by irrationally refusing the Renova Group's offer. But for that breach, a "Transaction" would have occurred and DCL would have received the success fee.

WHY DID THE BRAGANZA DUTY ARGUMENT FAIL?

The claim ultimately failed. Summarising the case law, Freedman J held that there was a distinction between contractual discretions, which are subject to a *Braganza* duty, and absolute contractual rights, which are choices under a contract that a party is entitled to make wholly in its own interests. Whether any particular choice falls into the former or the latter is a question of contractual interpretation.

Freedman J concluded that Pathfinder's right to decide whether or not to accept an offer of finance was an absolute contractual right. On the terms of the engagement, Pathfinder could, but was not required to, enter into a "Transaction" based on its own commercial assessments and in its own interests.

However, Freedman J also reasoned that if that decision was subject to a *Braganza* duty, it would be nigh on impossible for the court to construct a framework in which to determine objectively whether the discretion had been exercised rationally. The price of funding, the level of risk, the terms of a funder's participation were all quintessential commercial terms and a court was not well placed to assess whether the rejection of terms was unreasonable or irrational. These were powerful factors against the implication of a *Braganza* duty.

On the question of causation and loss, Freedman J also found that DCL faced "very significant obstacles" to establish those elements where DCL would need to prove that, but for the breach, a transaction would have occurred.

WHAT STEPS CAN YOU TAKE TO INCREASE YOUR CHANCES OF GETTING PAID?

It is clear that courts will not readily imply *Braganza* duties into commission agreements. A substantial part of the reasoning in *Horlick* turned on the particular wording of the agreement between Pathfinder and DCL. It may therefore be the case that a differently worded agreement would give rise to a different result, but any future case will need to overcome the additional problems to implying a *Braganza* duty, as identified by Freedman J.

In light of the decision in *Horlick*, those who work on a commission basis and those who draft commission agreements would be well advised to keep the following key points in mind:

- Draft commission agreements so as to carefully define the circumstances in which the right to remuneration arises.
- Consider express provisions setting out objective factors which the client must consider when accepting or rejecting an offer.
- Consider providing that some or all of the remuneration is due not on a 'transaction' but when an offer is made that meets certain objectively measurable criteria.