

exercise that the Court can call upon the coercive force of the State to implement its judgments. This is denied to an arbitrator, whose function therefore necessarily fails to partake of true judicial power, although he may be authorised by contract between the parties to make decisions, which are in their nature, judicial. The decisions of the arbitrator can be accorded enforceability at law under s.33 of the Commercial Arbitration Act 1984 (NSW), which provides for such enforceability only by leave of the Court and only then there is an exercise of judicial power.

This decision considerably strengthens the jurisdiction of arbitrators in hearing claims based on s.52 of the Trade Practices Act, 1974 and is the first decision which has held that an arbitrator may hold a contract to be void ab initio, while at the same time preserving the arbitration clause giving the source of the power to arbitrate the dispute.

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Contracts - Agreement to Negotiate is Void

Walford v Miles (1992) 2 W.L.R. 175 [House of Lords, England]

The defendants owned a photographic processing business and premises in London. They decided to try to sell the business and premises for £2m. The plaintiffs considered that the business and premises were "dramatically undervalued" and were worth £3m. The parties commenced negotiations and the defendants agreed that if the plaintiffs provided a letter of comfort from the plaintiffs' bank confirming that the bank would provide finance to the plaintiffs of £2m., the defendants would terminate negotiations with any third party or consideration of any alternative offers, with a view to concluding an agreement with the plaintiffs. This arrangement was made on 18th March but on the 30th March the defendants advised the plaintiffs that they had decided to sell to a third party.

The plaintiffs claimed that the defendants breached a "lock out" agreement and an implied term that they would negotiate in good faith with the plaintiffs. A lock out agreement is an agreement not to deal with third parties. The plaintiffs claimed that they lost the opportunity to acquire for £2m. a business and property worth £3m. The judge who first heard the matter found that there was a collateral contract whereby the defendants agreed to terminate negotiations with third parties and that the contract was breached. He awarded damages to the plaintiffs on account of their loss of an opportunity. The defendants appealed.

The House of Lords held that the alleged contract was void and that there was no implied term to negotiate in good faith. Delivering the unanimous decision, Lord Ackner said:

"The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty.

... the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that inter-

est he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms.

A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here where the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a "proper reason" to withdraw. Accordingly a bare agreement to negotiate has no legal content."

Lord Ackner said that there no reason why a "lock out" agreement could not be validly made but that to be locked out of negotiating with a third party does not mean that the party is locked into negotiating with the other party. Without a positive obligation to negotiate with the other party, the lock out agreement would be futile. In this case there was not even a valid lock out agreement because the alleged agreement did not specify how long it was to last. The alleged lock out agreement lacked the necessary certainty to make it an enforceable contract.

It will be pertinent to consider this case when drafting or attempting to enforce alternative dispute resolution agreements. This subject is discussed in *Breach of an ADR Clause - A Wrong Without Remedy* by Melinda Shirley in (1991) 19 Australian Construction Law Newsletter p.40.

In *Coal Cliff Collieries Pty. Ltd. v Sijehama Pty. Ltd.* (1991) 24 NSWLR 1 the NSW Court of Appeal held that a statement in a heads of agreement that the parties would "proceed in good faith to consult together upon the formulation of a more comprehensive and detailed Joint Venture Agreement" was not of binding contractual effect and did not give rise to a right to damages for breach.

- **Philip Davenport**