

## AGREEMENTS TO NEGOTIATE ... LEGALLY BINDING OR NOT

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It has long been law in Australia that courts will not enforce an incomplete agreement which is no more than an agreement to agree at some time in the future. This proposition was upheld by the High Court in *Booker Industries Pty Ltd v. Wilson Parking (Qld) Pty Ltd.*<sup>1</sup> The question therefore becomes whether an agreement to continue to negotiate in good faith will be treated likewise or whether the courts will enforce such an agreement. This question was recently raised in *Coal Cliff Collieries Pty Ltd v. Sijehama Pty Ltd.*<sup>2</sup>

### Facts of the Case

The respondents were holders of a mining authorisation to explore for coal in a certain area, which measured approximately nine kilometres by five kilometres, but they did not have sufficient resources to carry out the work. Whereas the appellants had such resources, but because of their classification as a foreign company they had difficulties in obtaining approval to mine new areas. It was therefore proposed that the parties enter a joint venture arrangement.

After five years of spasmodic negotiations a document entitled 'heads of agreement' was settled upon in October of 1981 (this agreement was at the centre of the litigation). Following this the parties attempted to negotiate and agree upon a more comprehensive and formal joint venture agreement, but even after four years, no such agreement had been made despite many attempts and the appellants decided to withdraw from further negotiations.

Contained in the stated 'heads of agreement' was a statement, which in so far as relevant, read that:

This document will serve to record the terms and conditions subject to and upon which ... [the parties] ... agree to associate themselves in an unincorporated Joint Venture for the purpose of developing and exploiting the coal prospect currently the subject of Authorisation Application Number A38. The parties will forthwith proceed in good faith to consult together upon the formulation of a more comprehensive and detailed joint venture agreement (and any associated Agreements) which

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\* Tutor in Law, Deakin University.

1. (1982) 149 CLR 600.

2. (1991) 24 NSWLR 1 (Court of Appeal).

then approved and executed will take the place of these heads of agreement, but the action of the parties in so consulting and in negotiating on fresh or additional terms shall not in the meantime in any way prejudice the full and binding effect of what is now agreed<sup>3</sup>.

The issue that came before that court was whether that agreement (namely the agreement to negotiate in good faith) was legally enforceable, in that it could be sued upon, so as to allow the respondents to recover damages from the appellants for the latter's withdrawal from negotiations.

### **The Decision**

The trial judge had decided that the agreement was legally enforceable, however on appeal that decision was reversed. The Court of Appeal were not however unanimous in their decision. Handley JA was in the minority when he held that a promise to negotiate was too illusory to be binding. His honour held that such an agreement should not be treated any differently under the law than a pure agreement to agree. In coming to this decision His honour looked solely at English authorities.

However, Kirby P, with whom Waddell A-JA agreed, held that he did not share the opinion of the English Court of Appeal, instead, after considering American authorities as well, his Honour held that an agreement to negotiate could in certain circumstances be held to be legally enforceable. However on the question on whether such a decision should be reached or not in any given case, his Honour held that it will depend upon the construction of the particular contract in question.

His Honour went onto explain that in many cases it will be clear that such a promise is intended by the parties to be of legally binding effect. The clearest illustration of such as case will be a situation where the parties give a third person the power to settle any future uncertainties. His Honour did however state that even in such cases, it would still be open to the court to find that the particular agreement was too illusory or uncertain to be enforceable.

His Honour went on to say that in a small number of cases the courts may be able to enforce an otherwise vague, uncertain or illusory promise by using a readily ascertainable external standard to fill the gap. However it was stated by his Honour that in the majority of cases a promise to negotiate in good faith will occur in the context of an arrangement which itself makes it clear that the promise is too illusory, uncertain or vague for the courts to enforce.

In conclusion, although his Honour states that in certain circumstances a promise to negotiate can be legally enforced, it was held

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3. *Id* at p. 13.

that the agreement and promise to negotiate presently before the court was not such a situation. The reasons for this include the fact that the present agreement did not nominate a third person to resolve the differences and the fact that it was felt that the court would not be well equipped itself to fill the gaps in the agreement which several years of negotiations had failed to remove.

His Honour did however go onto say that even if he concluded that the present promise was one which could be legally enforced, that he would have found that on the facts of the case, no breach would have occurred. The withdrawal by the appellants could not be said to have been wrongful.

### Lessons from the Case

Parties to negotiations have always been safe in their assumption that making agreements to negotiate or agreements to agree in the future have not legally bound them to anything. However, they best be warned that the situation regarding agreements to negotiate may be changing. Certainly it would seem the case in New South Wales as well as maybe in Queensland following the decision in *Trawl Industries of Australia Pty Ltd v. Effen Foods Pty Ltd* (trading as 'Uncle Bens of Australia').<sup>4</sup> However, in England it would still seem that such an agreement will be unenforceable following the House of Lords decision in *Walford v. Miles*<sup>5</sup>.

This area of law will remain uncertain until such time as a decision from the High Court on the matter is handed down. Unfortunately, such a decision will not come about from the present set of facts because an application for special leave to appeal to the High Court was denied on February 14, 1992.

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4. (1992) Aust Contracts Reports 90-011.

5. [1992] 2 WLR 174.

