

Developments in Agreements to Negotiate in Good Faith

Introduction

In our January 2005 newsletter, we compared the English, New York, Indonesian and French approaches the obligation to negotiate in good faith. The English law position was that obligations to negotiate in good faith are generally unenforceable.

In this newsletter, we examine the arguments raised in a recent Australian case, *United Rail Services Limited v Rail Corporation New South Wales*¹, in relation to enforcing obligations to negotiate in good faith and also consider whether the judgment will have any influence on the traditional English position.

Facts

The parties had agreed a multi-tiered dispute resolution clause which expressly required the parties to "*meet and undertake genuine and good faith negotiations*" before arbitration could be commenced. It was argued that an obligation to undertake good faith negotiations was void for uncertainty.

Relevance of English law to the Decision

English law became the applicable system of law in Australia upon colonisation by the English in 1788. In fact, Australia did not obtain complete legislative independence until the second half of the twentieth century. Australian courts were bound by the House of Lords until 1963 and the Privy Council until 1978. Moreover, the Privy Council remained the highest appeal court in the Australian legal system until the passing of the Australia Acts of 1986.

The Australian legal system is now entirely independent from the English system, but English law decisions continue to be cited and relied upon in cases before the Australian courts. Conversely, the close connection between the two systems of law results in Australian judgments being cited and considered in English proceedings. Neither national court is bound by judgments of the other, but counsel will submit that the foreign judgments upon which he intends to rely are persuasive and should be taken into consideration.

Decision

Given the relevance of English authorities to Australian jurisprudence, the New South Wales Court of Appeal (the "**NSWCA**") considered both the relevant English and Australian authorities. In particular, it noted the English judiciary's reluctance to incorporate a general implied duty of good faith in negotiations. The NSWCA, however, declined to follow the English authorities and held that the express agreement to negotiate in good faith was enforceable.

Critique of the English Authorities

The judgment of the NSWCA dealt with the current line of English authorities on the unenforceability of an obligation to negotiate in good faith as follows:

1. *English law position - an agreement to negotiate is too uncertain to enforce.*² The NSWCA departed from the English position and found that an agreement to negotiate in good faith was not an incomplete and unworkable agreement, but rather an obligation to undertake discussions about a subject in an honest and genuine attempt to reach an identified result. It was therefore sufficiently certain to enforce.
2. *English law position - an obligation to negotiate in good faith is inherently repugnant and impossible to police.*³ The NSWCA again departed from the English position and held that the parties had voluntarily assumed an obligation to meet and negotiate honestly and genuinely with a view to resolve any disputes, and that a mere difficulty

¹ [2009] NSWCA 177

² *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297 per Lord Denning at 301-302; and *Walford v Miles* [1992] 2 AC 128 per Lord Ackner at 138

³ On the basis that negotiation is adversarial and parties should be entitled to pursue their own interests and withdraw from or continue negotiations at their unfettered discretion.

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for the courts to enforce this obligation cannot of itself mean that a real obligation with real content does not exist.

3. *English law position - damages arising from a failure to negotiate in good faith are impossible to assess:*⁴ The NSWCA once more departed from the English position and held that it was possible to assess the damages arising from a failure to negotiate in good faith. Although there can be no certainty as to whether the negotiations would have been successful or not, damages could nonetheless be based on the loss of the opportunity.

Express Obligation

The NSWCA also held that the policy arguments in the English authorities against the imposition of a general duty of good faith lose much of their force in the case of an express obligation agreed by the parties.

Where the obligation to negotiate in good faith arose pursuant to a clearly worded, express promise of the parties, the NSWCA held that, if business people were prepared to constrain themselves by reference to express words which have a sensible meaning, "*the task of the Court is to give effect to, and not to impede, such solemn express contractual provisions*".

The Future for English Law

From a wider perspective, the requirement to perform contracts in good faith is a well established principle in civil jurisdictions such as Japan. As demonstrated by *United*, common law jurisdictions are also capable of recognising good faith. English law has, however, refrained from incorporating a general principle of good faith into contractual arrangements. Instead, English law is said to have developed a number of alternative solutions specifically tailored in response to demonstrated problems of unfairness.⁵

Examples of such solutions are the English law rules on misrepresentation, duress and undue influence (under which contracts entered into as a result of misleading statements, illegitimate pressure or other forms of wrongdoing may be set aside), estoppel (under which a party making a promise is unable to act inconsistently once the promise has been relied upon) and, in certain circumstances, the regulation of contractual terms (for example, the reasonableness test in the Unfair Contract Terms Act 1977).

In addition, there are now instances of the very phrase "good faith" creeping into the language of English law. For example, there are express references to good faith in the Unfair Terms in Consumer Contracts Regulations 1999 and the Commercial Agents (Council Directive) Regulations 1993 which require application by the English courts.⁶

Turning back to the issue in *United*, there are indications that, despite the traditional hostility, the English courts may in the future be willing to consider upholding an express duty to negotiate in good faith. In 2005, an English court went so far as to comment in a judgment, although without binding effect, that the traditional objections may not apply to a clearly expressed obligation to negotiate in good faith as it would be "*a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered*".⁷

Conclusion and Practical Advice

While *United* may have settled the position under Australian law, it would be no more than a persuasive authority should English counsel seek to rely upon it before an English court. In the absence of a binding English authority to the contrary, the starting assumption for parties contracting under English law will remain that obligations to negotiate in good faith are likely to be considered unenforceable, regardless of whether they are express or implied.

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⁴ Courtney & Fairbrain v Tolaini Brothers (Hotels) Ltd [1975] 1 WLR 297 per Lord Denning MR at 301-302

⁵ Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1980] QB 433 per Bingham J

⁶ Director General of Fair Trading v First National Bank Plc [2002] 1 AC

⁷ Petromex v Petreleo Brasileiro SA Petrobras [2005] EWCA Civ 891