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UPDATE

Can an agreement to negotiate be a valid contractual obligation?

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In this article we look at the enforceability of an agreement to negotiate as a matter of both English and Jersey law and its relevance to practitioners across these jurisdictions and beyond.

Agreements to negotiate in good faith are often included by commercial parties in a variety of contexts, including heads of agreement, clauses for price review in the event of a change in circumstance, and mechanisms for the resolution of disputes before they go to arbitration or litigation. In order to create an enforceable obligation, it is fundamental in both England and Jersey that the parties intend that the agreement has contractual effect. But even if that hurdle is overcome, the issue remains whether the law recognises an agreement to negotiate at all. The traditional view is that it does not. In the words of Lord Denning, an agreement to negotiate is '*not a contract known to the law*'.[1] Is this still the case? Is Jersey law any different from English law?

We start by looking at the leading Jersey case, namely the 2014 decision of the Jersey Court of Appeal in *Minister for Treasury and Resources v Harcourt Developments Ltd and Ors* 2014 (2) JLR 353. On certainty of contract, English law was followed; and the traditional view was taken. The case therefore stands as an example of that approach. We then look at other developments, both in England and elsewhere in the common law world, as well as the significant extra-judicial observations which have more recently been made by Lord Leggatt.[2] These developments suggest that the leading authority in England and Wales – the House of Lords decision in *Walford v Miles* [1992] 2 AC 128 – might well be departed from as and when a suitable case reaches the Supreme Court. In a jurisdiction such as Jersey, where decisions of the English courts are not binding, but merely persuasive, and where it is open to advocates to build arguments on the basis of other authorities, we suggest that the courts could also take a different approach and recognise that an agreement to negotiate can be a binding contract.

Minister for Treasury and Resources v Harcourt Developments Ltd and Ors

Harcourt concerned 'Heads of Terms' entered into between a property development company (Harcourt) and a company established by the States of Jersey in order to implement a development strategy for public land on the St Helier waterfront (WEB). The Heads of Terms, entered into in 2007, set out in outline what had been agreed but envisaged that a development agreement was in due course to embody the contractual arrangements '*intended to be entered into between the first defendant and the plaintiffs in relation to the proposed development . . .*'. The crucial provision was Clause 3.4. This stated that '*by their execution of these heads of terms the parties are hereby agreeing to act in good faith and with all due diligence with a view to seeking to agree the terms of the development agreement*'.

[1] *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297

[2] George Leggatt, 'Negotiation in Good Faith: Adapting to Changing Circumstances in Contracts and English Contract Law', Jill Poole Memorial Lecture, Aston University 19 October 2018. https://www.judiciary.uk/wp-content/uploads/2018/10/leggatt-jill-poole-memorial-lecture-2018.pdf. The present authors have gratefully drawn generally on Lord Leggatt's argument and have been guided to many of the cases he refers to.

WEB was entitled under the terms to terminate the Heads if a development agreement had not been signed by 30 June 2008. Negotiations continued beyond this point but by July 2009 they had broken down. WEB gave formal notice of termination. Harcourt considered that WEB was responsible for the failure to reach agreement and that it had, in particular, breached its obligation in Clause 3.4 to negotiate the terms of the envisaged development agreement in good faith and will all due diligence. They sued the Minister for Treasury and Resources for the tort of inducing WEB to breach the contract and sought damages of approximately £100m.

The Minister applied to strike out the claim on the basis that it disclosed no reasonable cause of action. It was contended that Clause 3.4 constituted a mere agreement to agree or agreement to negotiate and that such agreements lacked the certainty required in order to amount to a contract; and, if there was no contract, the Minister could not have committed the tort of inducing a breach of contract. In the Royal Court, Birt, Bailiff, found considerable force in these submissions. He nevertheless declined the strike out application. Bearing in mind the high threshold required for a strike out application, he noted that he had not heard evidence on the full factual context which might be relevant to interpretation of the Heads, that certain scenarios could be envisaged where Clause 3.4 could amount to an enforceable contract and that this was a developing area of law. The Minister appealed to the Court of Appeal. This time he was successful. Like the court below, the appeal judges noted that Jersey customary law requires a contract to have an '*objet*' (the content of each parties' obligations) and that the *objet* of a contract must be sufficiently certain. The resulting position with regard to certainty of contractual terms is then the same as English law. Reviewing both English and Jersey case law, and in particular relying on the persuasive value of House of Lords decision in Walford v Miles, the Jersey Court of Appeal concluded that it was '*incontrovertible that in Jersey law an agreement properly characterised as an agreement to agree or agreement to negotiate is not one which can create a contractual obligation and therefore is incapable of enforcement*'. Clause 3.4 could not create a legal obligation even if the parties intended it to do so.

Comment

In line with dicta in previous English cases, the Jersey Court of Appeal treated 'an agreement to agree' and 'an agreement to negotiate' as essentially falling into the same category; indeed, for convenience, both were expressly defined to as 'an agreement to agree'. But there is surely a significant difference. As Lord Leggatt has remarked extra-judicially in a talk given in 2018, '*Parties who agree to negotiate do not agree to agree. They agree to engage in a process – a process of holding discussions with a view to trying to reach an agreement. They give no undertaking about what the result of the process will be. They do not promise that the negotiations will be successful and that they will then enter into a contract*.'.[3]

There is also a difference (as the Jersey Court of Appeal pointed out) between two bases upon which a party to Heads of Agreement of this nature could assert a claim. The first is to argue that Heads amount as a whole to a sufficiently certain contract, with any gaps sufficiently filed in by a process set out in the Heads, and with the Heads being construed as immediately operative and not conditional upon the entry into of the envisaged, more detailed contract. The second is to contend that a provision to engage in good faith negotiation, such as that in Clause 3.4, is itself valid as a standalone obligation, one in respect of which, in the event of breach, damages could be awarded (on what basis is considered further below).

The Court of Appeal considered that there might have been an enforceable obligation if the parties had '*stipulated a process for arriving at making the of the development agreement with terms yet to be agreed, and although the process might not in the event lead to a concluded development agreement, nevertheless the process itself was sufficiently defined so that a breach of the process could give rise to a claim in damages*'. In this case, the Court of Appeal said, the process stipulated by the parties – negotiation in good faith with due diligence – lacked the necessary certainty. One could not find the required certainty '*simply in the indication that the negotiations are to be in good faith and with due diligence as the meaning of "good faith" in negotiations is itself inherently uncertain … [and] the addition of the requirement of due diligence as an additional feature of the required negotiations does not remove the inherent uncertainty*'.

Yet is that really so? It is not the concept of good faith that is particularly uncertain; courts regularly have to decide whether a person, such as a fiduciary, has or has not acted in subjective good faith or with honesty.

[3] George Leggatt, 'Negotiation in Good Faith'.

A perhaps greater difficulty lies in answering the more specific question whether a party has pursued or broken off negotiation in good faith, particularly in cases where a time frame for parley has not been specified. This was one of two reasons given by Lord Ackner in *Walford v Miles* for not recognising agreements to negotiate at all. Some agreements might indeed be so inherently uncertain as to be incapable of founding a claim for relief; but each can be considered in own terms, in its own context, and then measured against the charge of uncertainty. As noted above, the parties in *Harcourt* expressly obliged themselves to negotiate not only in good faith but '*with due diligence*' and there was also a backstop date allowing WEB to withdraw if the negotiations did not come to fruition. The claimant's difficulties in establishing lack of good faith in negotiation would have been more narrowly evidential. The agreement itself has content – negotiation in good faith.[4] Evidential difficulties are not generally a reason for the law to refuse to recognise at all obligations to which parties have contractually obliged themselves for what they perceived at the time to be perfectly sound commercial reasons. To decide otherwise is (as Teare J remarked in *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] 2 Lloyd's Rep 457) to frustrate their reasonable expectations.[5] Lord Leggatt, this time robed as Leggatt J (as he then was) in *Astor Management AG & Anor v Atalaya Mining plc & Ors* [2017] EWHC 680 (Comm) [2017] 1 C.L.C. 724 described the court's role such cases in the following way: '*The role of the court in a commercial dispute is to give legal effect to what the parties have agreed, not to throw its hands in the air and refuse to do so because the parties have not made its task easy. To hold that a clause is too uncertain to be enforceable is a last resort or, as Lord Denning MR once put it, 'a counsel of despair': see Nea Agrex SA v Baltic Shipping Co Ltd [1976] QB 933, 943*.'

It is, moreover, quite possible to envisage cases in which bad faith can be proved without difficulty.[6] The application of a blanket restriction then becomes particularly indefensible. Should the law really deny a remedy to a party who is the victim of a provable and egregious breach of contract simply because other claimants, in different circumstances, would have greater evidential difficulty in establishing their case?

The second reason given by Lord Ackner in *Walford v Miles* for refusing to recognise an agreement to negotiate in good faith is that such an agreement is '*inherently repugnant to the adversarial position of parties involved in negotiations*'. In response, Lord Leggatt observes that this is only a general description of the position under English law when parties have not entered into self-imposed contractual constraints. There is no reason why parties should not choose, at some appropriate stage in their discussions, to enter into a binding agreement to negotiate with each other in good faith for a stated or implied period of time. They would thereby be agreeing mutually to take genuine and honest positions, with a view to reaching a deal if at all possible, and to limit the circumstances in which they can walk away. The recognition of such an agreement is not a departure from the principle of freedom of contract. It is an application of it.

Further developments

In a 1996 lecture, only four years after *Walford v Miles*, Lord Steyn expressed surprise that the House of Lords had held that an agreement to negotiate in good faith was unenforceable. He hoped that the highest court might one day have the opportunity to re-examine the matter.[7]

That opportunity has not yet arisen in England. But elsewhere in the common law world *Walford v Miles* has not met with universal favour. It has been followed in some jurisdictions, including New Zealand[8] and Hong Kong.[9] But in *United Group Rail Services Ltd v Rail Corpn New South Wales* [2012] 4 SLR 378, the New South Wales Court of Appeal examined the issues in detail and found *Walford v Miles* unpersuasive. It upheld an agreement under which the parties, in the event of a dispute or difference, would '*meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference*'. The judgment of Allsop P is described by Lord Leggatt as impressive and it reflects much of his own thinking. It

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[4] See *United Group Rail Services Ltd v Rail Corpn New South Wales* [2012] 4 SLR 378 at [65]. Allsop P giving the judgment of the New South Wales Court of Appeal observed: '*An obligation to undertake discussions about a subject in an honest and genuine attempt to reach an identified result is not incomplete. It may be referable to a standard concerned with conduct assessed by subjective standards, but that does not make the standard or compliance with the standard impossible of assessment*.' The case is referred to further below,

[5] See also per Longmore LJ in *Petromec Inc v Petroleo Brasileiro SA Petrobuxs (No 3)* [2005] Lloyd's Rep 161 at [121].

[6] George Leggatt, 'Negotiation in Good Faith'.

[7] Sultan Azlan Shah Law Lecture delivered on 24 October 1996.

[8] *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486.

[9] *Hyundai Engineering & Construction Co Ltd v Vigour Ltd* [2005] 3 HKLRD 723.

was also influential on the judgment of Teare J in *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] 2 Lloyd's Rep 457, which is mentioned further below.

In Singapore, an agreement to negotiate in good faith the amount of the new rent on the occasion of a rent review has also been held to be enforceable: see *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Developments Singapore Pte Ltd* [2012] 4 SLR 378.

In *Walford v Miles* there was, in fact, no express term of contract requiring negotiation in good faith; rather it was argued by the plaintiffs that an agreement to negotiate was implied term in a lockout agreement entered into between the parties in the course of their (subject to contract) discussions for the sale and purchase of a business. The House of Lords was clear that an agreement to negotiate would not have had legal effect, had they found it existed, and the case remains binding in England. But the unusual circumstances in which the issue arose in *Walford v Miles* have left some leeway for subsequent courts to distinguish it.

This was notably so in *Petromec Inc v Petroleo Brasileiro SA Petrobuxs (No 3)* [2005] Lloyd's Rep 161. Here the parties expressly agreed to negotiate in good faith the '*reasonable extra costs*' of upgrading an oil rig. Longmore LJ, giving the judgment on this issue of the Court of Appeal, recognised that *Walford v Miles* was binding '*for what it decides*'. But he went on to consider the '*traditional objections*' to the enforceability of an agreement to negotiate and concluded that they were not sufficient to support a principle of blanket unenforceability. In an appropriate case, and *Petromec* was one, *Walford v Miles* could be distinguished. It was relevant inter alia that the extra costs, and thus any loss flowing from a breach, were on the facts comparatively easy to assess and that the obligation to negotiate in good faith was an express obligation contained in a complex binding contract.

The way thus lit by the Court of Appeal, lower courts have followed in a number of cases. One such is the case already mentioned of *Emirates Trading Agency LLC*. The clause in question expressly required the parties to '*first seek to resolve the dispute or claim by friendly discussion*' before an arbitration clause was triggered. Teare J distinguished *Walford v Miles*. Referring in particular to *Petromec* and the judgment of Allsop P in the New South Wales case of *United Group Rail Services*, he held that the clause was enforceable. The clause was not uncertain; it was right to uphold the parties' expectations; and in this case it was also in the public interest to uphold an agreement whose object was the avoidance of expensive and time-consuming arbitration. These reasons have more recently been endorsed obiter by Fraser J when considering a similar clause in *The Football Association Premier League Limited v Pplive Sports International Limited* [2022] [2022] EWHC 38 (Comm).

Walford v Miles nevertheless remains binding and has been duly followed in England in cases where it cannot be distinguished. Its shadow cannot always be avoided; nor do all judges seek to do so. It is hoped that the Supreme Court will have an opportunity before long to consider again the status of agreements to negotiate, and not merely agreements to agree, and to clarify the law generally on this issue.

Bases and assessment of damages

Lord Denning, giving the judgment of the Court of Appeal in *Courtney & Fairbairn Ltd v Toliani Brothers (Hotels) Ltd* [1975] 1 WLR 297, considered that, since no one can tell whether negotiations would have been successful, a court cannot estimate damages for breach of an agreement to negotiate.[10] But Lord Leggatt makes the point in his talk that there are various bases, depending on the case, on which damages could be awarded in the event of breach of an agreement to negotiate. The fact that no loss can be shown, or damages are impossible to estimate, is not a reason for holding that no contract known to the law exists. Nominal damages may be awarded. In other cases, the outcome of negotiation, had it properly ensued in good faith, might in fact be provable and the innocent party's loss quite capable of being established on the balance of probabilities. If no other basis apples, damages might at least be awarded for wasted expenditure. There are then also cases where it may be appropriate to award substantial damages on a loss of chance basis – that is, the loss of the opportunity of successfully concluding a profitable contract.

[10] Like Lord Ackner in *Walford v Miles*, Lord Denning gave two reasons for the blanket unenforceability of agreements to negotiate. But the two reasons are not (as Lord Leggatt also pointed out in his talk) the same as Lord Ackner's. Lord Denning's first reason draws an analogy between agreements to agree and agreements to negotiate. We have quoted Lord Leggatt's analysis above by way of counter argument. The second concerns the assessment of damages,

It was on this last-mentioned basis that a substantial claim was recently successful in *Brooke Homes (Bicester) Ltd v Portfolio Property Partners and Ors* [2021] All ER (D) 68 (Nov). The parties had entered into Heads of Agreement, expressed to be a binding contract, with a view to the acquisition and development of land for housing. The Heads included an obligation on the parties '*to use all reasonable endeavours to enter into a final binding agreement which captures legally these Heads of Agreement acting in good faith towards each other by 31st March, 2015*.'.[11] It was contended by the claimants that the defendants had breached both this agreement and a related Exclusivity Agreement. In these circumstances the defendants conceded that the provision above was enforceable. Remarking on this concession, Hugh Sims QC, sitting as a deputy High Court judge, noted that cases such as *Petromec* '*show that the courts will now be more willing to recognise an obligation to negotiate on some matter, using reasonable endeavours, or in good faith, where it is found in a binding agreement*.' His judgment includes an instructive analysis of the differences between 'reasonable endeavours, 'all reasonable endeavours'; and 'best endeavours' and the content of a contractual duty of good faith. On the facts he found that both this agreement and the Exclusivity Agreement had been breached.

As to the question of causation of loss, an important question was whether causation needed to be established as a matter of the balance of probabilities or on a loss of chance basis, requiring only a causative breach giving rise to the loss of a real and substantial chance of benefit. Since the outcome of the negotiation would have depended not only on what the parties to the proceedings would have done, but also the decisions of third parties, it was appropriate to deal with causation on the loss of chance basis, rather than the balance of probability that a contract would have been concluded.[12] Causation was established on this basis for the loss of the opportunity to enter into a particular profitable contract. Discounted damages in the sum of £13.4m were then awarded for the loss of this chance.

Some further considerations of Jersey law

An agreement to negotiate should, in principle, be capable of forming the valid *objet* of a contractual obligation for the purposes of Jersey contract law and there is no reason why Lord Leggatt's powerful reasons for recognising such agreements should not equally apply in Jersey. There are, moreover, two additional reasons. The first is that Jersey law places great weight on the maxim *la convention fait la loi des parties* (the contract makes the law between the parties). Accordingly, very good reason needs to be shown why the court should relieve parties of an agreement which they have freely entered into.[13] The second is that the concept of good faith and the need to act in good faith probably (the point has not yet been conclusively determined) has a much more fundamental and inherent role in Jersey contract law, because of its civilian roots, than it does in English contract law. It is therefore strange that the Jersey courts should so readily have declined to recognise a freely chosen contractual agreement to negotiate in good faith.

It is also relevant that the technical doctrine of consideration under English law does not apply in Jersey. Rather, contracts must have a valid cause (or reason). This is a broader concept than consideration and it is usually not difficult to find; agreements to negotiate that might fail for want of consideration in England are unlikely to do so where the contract in question is governed by Jersey law.

Conclusions

We have referred above to the continued readiness of the English courts to distinguish *Walford v Miles* where possible and to the forceful extra-judicial comments of Lord Leggatt, now a Justice of the UK Supreme Court. Together these considerations suggest that, given an opportunity, the Supreme Court may well chose to follow the example of New South Wales in *United Group Rail Services Ltd v Rail Corpn New South Wales* and thus depart from *Walford v Miles* and recognise the general enforceability of an agreement to negotiate or at least clarify the conditions under which they are enforceable.

As for Jersey, the reasoning underlying this change of approach is not merely reflected in the local law; it is reinforced for the reasons mentioned above. Although *Walford v Miles* was followed by the Jersey Court of Appeal in *Harcourt Developments* it is still open to the Royal Court, as a matter of Jersey jurisprudence, to decline to follow a decision of the Jersey Court of Appeal if there has been '*a compelling change of*

[11] It was acknowledged by the parties that the specified date, falling in fact before the Heads were executed, was a mistake. The judge found on the facts that the period extended to the end of an exclusivity period under the related Exclusivity Agreement.

[12] Applying *Perry v Raleys Solicitors* [2019] UKSC 5, [202] AC 352 at [20].

[13] See, for example, *Makarenko v CIS Emerging Growth Ltd* 2001 JLR 348, at [32].

circumstances'[14]; and short of that, it will be open to the Court of Appeal to depart from its own earlier decision. A case like *Harcourt Developments* should at least not be susceptible to being struck out as a matter of legal principle at an early stage.

When it comes to a trial, of course, proof on the evidence will be another matter. The facts in *Harcourt Developments* were never tested. A plaintiff must not only win the legal argument for the validity of the agreement in question; they must also win on the facts. The difficulties in establishing the other side's breach of an agreement to negotiate or lack of subjective good faith could be substantial. Bearing in mind the burden of proof, potential plaintiffs will be well advised to assess realistically and carefully the strength of evidence on which they seek to rely; but in our opinion, notwithstanding *Harcourt Developments*, the way is open in Jersey for a strong case to be won.

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[14] *State of Qatar v Al Thani* 1999 JLR 118; quite what 'changes in circumstance' are relevant is not cleat but on the face of it the Royal Court has considerable scope to follow other jurisdictions which have departed from *Walford v Miles*. The Privy Council, on appeal from Jamaica, in *National Transport Co-operative Society v The Attorney General* [2009] UKPC 48 has also stated that *'the principle that an alleged contract is ineffective or unenforceable in law because it is too vague, or because it constitutes an agreement to agree, or an agreement to negotiate, is well-established*.' The case concerned an agreement to agree, rather than an agreement to negotiate; and thus, although the dictum above extends to agreements to negotiate, the case is not directly in point. Furthermore, being an appeal from another jurisdiction, the Board's opinion is not binding in Jersey: see also *State of Qatar v Al Thani* 1999 JLR 118.