PRE CONTRACT DEALINGS

Traditionally pre-contractual dealings are not recognised as a place for contractual remedies. This is certainly still true even when the terms "subject to contract" is used as seen in the judgement provided by Rattee J[1], if "subject to contract" is used or not "each party is free to withdraw from negotiations at any time". This is commonly known as the freedom of contract principle. Freedom of contract is a "negative freedom"[2]

It is easy to see how some contracting parties would be tempted into securing their negotiations through contract, or an agreement to agree. In *May & Butcher v R*[3] and agreement for the sale of tentage provided that the price, dates of payment and manner of delivery should be agreed "from time to time". On these facts, the House of Lords held that the agreement was incomplete, as it was open ended. It was famously upheld by Lord Denning[4] that the law would categorically not recognise a contract to negotiate and he went on to say if there was a fundamental term left to negotiate then there would be no contract at all.

If the law does not recognise a contract to enter into a contract (when there is a fundamental term left to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is it is too uncertain to have any binding force. No court could estimate the damages because no-one can tell whether the negotiations would be successful or fall through; or if successful, what the result would be. It seems to me that a contract to negotiate, like a contract to enter a contract, is not a contract known to the law.

It is very difficult to make generalisations in this area but it seems courts look for substantial agreement between the parties and, if this is present, it accords with commercial practice that some points may be left out for future resolution without vitiating the agreement as long as it is not a "fundamental term". It is nevertheless very difficult to ascertain the nature and extent of the issues that may be left for future agreement. In *Foley v Classique Coaches Ltd*[5] the plaintiff owned a petrol station and adjoining land which he agreed to sell to the defendants on the condition they should agree to buy all the petrol for their coach business from him. The agreement regarding the petrol was executed and provided that it was to be supplied "at a price to be agreed by the parties in writing from time to time". The land was conveyed and the petrol agreement was acted upon for three years but the defendants the repudiated it arguing that it was incomplete in relation to the price of petrol. The Court of Appeal held that the agreement was enforceable and that consequently, the defendants must pay a reasonable price for the petrol. The most influential factors in the decision appeared to be that the contract had been acted upon for several years and that the petrol formed part of a linked bargain with the sale of the land, the defendants paying a price for the land which no doubt reflected the fact that they would buy their petrol from the plaintiffs.

---

[1] *Regalion Properties plc v London Dockland development corp.* [1995] 1 A11 ER 1005 at 1024
[2] Jack Beatson and Daniel Friedman, *Good Faith and Fault in Contract Law*, Clarendon Press Oxford , pg 27
[3] [1935] 2 KB 17n
[4] In *Courtney & Fairbairn Ltd. V Tolani Brothers (hotels) Ltd* [1975] 1 WLR 297
[5] [1934] 2 KB 1

Adverse to English law, many other countries do not see the freedom of contract as so precious. There is much more of an emphasis upon promises, pre contractual statements and negotiations becoming binding due to the doctrine of good faith. However it is found in English law that there is a potential for abuse under the freedom of contract, say where the parties enter into the contract but before the contract is finalised negotiations fall though other countries this situation is avoided by using the doctrine of good faith. A better definition of good faith would be that the contracting parties must be considerate towards each other. They rely on each other. This reliance is translated into a legal duty of fairness, the breach of which usually entails liability in damages."[6] It can be said that traditionally English law has "committed itself to no such overriding principle".[7]

This position of agreements to negotiate and good faith was considered by the House of Lords in *Walford v Miles*[8]. We see the courts favouring a Laissez-faire principle of self-reliance and judicial non-interventionism. The plaintiff and defendant were negotiating the sale of the defendant's business and an agreement was reached by which the plaintiff would provide the defendant with a letter of comfort from the plaintiff's bankers confirming that a loan would be granted to the plaintiff. In return, the defendant agreed to terminate any negotiations with third parties and not to consider any alternative offers. The comfort letter was provided but the defendant withdrew from the negotiations and sold the business to a third party. The House of Lords held that the plaintiff's action must fail. The *Courtney v Fairbairn* judgement was used here as they held an agreement to negotiate is like and agreement to agree and therefore unenforceable. The house also considered that it was possible to have a contract not to negotiate with third parties provided that the duration of this "lock-out" was specified expressly but that the parties could never be "locked-in" by such an arrangement to negotiate positively as this would amount to an uncertain and unenforceable contract to negotiate.

Two recent and important decisions cast doubt upon the notion that the courts will strive to uphold the parties' bargain. *Kleinwort Benson Ltd v Malaysia Mining Corporation Berhad* [1989] 1 WLR 379 concerned a letter of comfort which the defendant issued to the claimant in respect of a loan of £10 million to the one of the defendant's subsidiary companies. Comfort letters possess varying degrees of formality but here the letter was negotiated between the parties and contained the statement by the defendant that it was its "policy to ensure that the business of [the subsidiary] is at all times in a position to meet its liabilities to you under the above arrangements". The defendant argued that neither party intended this statement to be contractually binding . At first instance, it was held that the plaintiff should succeed as: a) the presumption of intention to create legal relations which applies to commercial contracts had not been rebutted by the defendant; b) the wording was unambiguous and "crystal clear"; and c) the undertaking was of crucial importance and the plaintiff had acted in reliance on it in advancing the loan. The Court of Appeal reversed the decision and held that the wording of the undertaking did not amount to contractual promise and thus the question of rebutting the presumption of intention to

---

[6] Jack Beatson and Daniel Friedman, *Good Faith and Fault in Contract Law*, Clarendon Press Oxford , pg 28

[7] Bingham LJ, opening judgement in Interfoto Picture Library Ltd. V Stiletto Visual Programmes Ltd [1989] QB 433

[8] [1992] 2 AC 128

create legal relations never arose. Moreover the court considered that the statement was only one of present intention in that the defendant's "policy" could change in the future. The Court of Appeal's reasoning appears to ignore the presumption of intention and, if that presumption has not been rendered redundant by the decision, it is very difficult to ascertain in which circumstances it will apply.

Klienwort and *Walford* are paradigmatic of Laissez-faire principles of self-reliance and judicial non-interventionism. It is suggested that the decisions ignore English law's basic tenet that agreements should be validated wherever possible and, in doing so, will encourage bad faith in commercial transactions.