

AGREEMENT TO NEGOTIATE IN GOOD FAITH

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KEY POINTS

A simple agreement to negotiate in good faith is likely to be deemed unenforceable by the courts.

Agreements to negotiate in good faith are more likely to be enforceable if they incorporate some form of readily ascertainable standard against which to assess whether the parties have acted in good faith.

Even if a 'negotiate in good faith' provision is unenforceable, this does not necessarily prevent it from triggering further dispute resolution procedures.

The courts may imply a duty to negotiate in good faith, although such a duty is unlikely to be an onerous one.

INTRODUCTION

It is a common promise 'the parties must negotiate in good faith'. It may form part of a dispute resolution process or exist to encourage the parties to negotiate a fuller agreement, but the question remains—is it enforceable?

Traditionally, an agreement to negotiate was considered unenforceable for lack of certainty since it was akin to an agreement to agree. Then came the 1991 decision of the NSW Supreme Court in *Coal Cliff Collieries*.

The courts are still reluctant to enforce promises to negotiate in good faith. However, even if such a promise is unenforceable for uncertainty:

- this will not necessarily undermine the entirety of a dispute resolution clause, as seen in *Laing O'Rourke v Transport Infrastructure*, and
- in future, it is possible the courts will nevertheless imply a duty to conduct negotiations in good faith in limited circumstances, *Jobern Pty Ltd v BreakFree Resorts*.

AGREEING TO NEGOTIATE IN GOOD FAITH— ENFORCEABLE IN SOME CIRCUMSTANCES

Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 NSWLR 1

In this case, the parties had promised to proceed 'in good faith to consult together upon the formulation of a more comprehensive and detailed joint venture agreement'.

Justice Handley upheld tradition and found the promise was illusory and unenforceable since the parties could 'withdraw or continue, accept, counter offer or reject, compromise or refuse, trade-off concessions on one matter for gains on another and be as unwilling, willing or anxious and as fast or as slow as they think fit'.

Justice Kirby agreed the promise was unenforceable, but suggested that an explicit promise to negotiate in good faith could be certain enough to be legally binding in some circumstances. Such circumstances would tend to exist when:

- the promise is clear and part of an undoubted agreement between the parties, and
- by reference to a readily ascertainable external standard, the court is able to 'add flesh' to a provision.

The application of these principles by the courts may be seen in two more recent cases.

UNENFORCEABLE BUT STILL EFFECTIVE AS A DISPUTE RESOLUTION TRIGGER

Laing O'Rourke v Transport Infrastructure [2007] NSWSC 723

In this case the second defendant entered into a development deed ('Development Deed') with the first defendant and also into

a 'back-to-back' design and construct contract ('D&Contract') with the plaintiff. The defendants entered into an independent certifier deed ('IC Deed') which allowed for the administration of extensions of time for each stage of the project. However, the IC Deed's dispute resolution provision was very different to those under the two other contracts. It provided essentially only one dispute resolution mechanism (not including litigation), namely that the parties' representatives must:

- meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference, and
- if they cannot resolve the dispute or difference, endeavour to agree upon a procedure to resolve the dispute or difference.

Justice Hammerschlag found that the provision was unenforceable for uncertainty. He followed Justice Handley's approach from *Coal Cliff Collieries*, but noted that even using Justice Kirby's approach, there was no external standard to rescue the promise from uncertainty.

The D&C Contract contained an identical agreement to negotiate in good faith. Unlike under the IC Deed, it served as a trigger in the dispute resolution process such that a party could only proceed to the next step (expert determination) once good faith negotiations had failed. The question became, if the good faith negotiations clause was unenforceable, could it still trigger the next step in dispute resolution or was the whole process undermined?

Justice Hammerschlag found that although the obligation to negotiate in good faith was unenforceable due to uncertainty, the concept of failing to negotiate a solution in good faith was still

certain enough to trigger expert determination since the contract specifically contemplated such failure to agree.

AN IMPLIED OBLIGATION TO NEGOTIATE IN GOOD FAITH?

Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd—BC200705750

This case concerned the other common context in which promises to negotiate appear—a promise to negotiate a fuller agreement.

The parties entered into a heads of agreement for the development and construction of several stages of the Erskine Resort development in Lorne, Victoria under which the parties agreed to negotiate a long form contract and to 'conduct such negotiations in good faith to ensure that the terms set out in these heads of agreement are given full effect'.

Negotiations stalled and BreakFree terminated the heads of agreement. BreakFree argued that Jobern had breached the agreement to negotiate in good faith.

Justice Gordon turned to the question of whether the agreement to negotiate in good faith was enforceable. He found that it was not, citing *Coal Cliff Collieries*.

He then considered whether there was an implied duty to negotiate in good faith. Justice Gordon found that the content of such a duty is unclear but would likely oblige parties to:

- exercise 'reasonableness' (See Finkelstein J in *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) 21 ATPR 41);
- behave honestly (rather than necessarily non-negligently);
- not act in 'bad faith' (an example of 'bad faith' may be arbitrarily

and capriciously exercising a right to terminate);

- not oblige a party to subordinate its own interests or restrict its actions if they are reasonable, not otherwise in breach of an express provision and are designed to promote its legitimate interests;

- turn on the particular provision, in the particular contract, in the particular circumstances of the case; and

- render the duty to negotiate in good faith hard to breach. Justice Gordon noted he had been referred to only one Australian decision which held the duty to have been breached, that case being *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2005] FCA 288.

Given these principles, Justice Gordon found Jobern had not breached any implied duty to negotiate in good faith and so resisted from determining whether such an implied duty exists.

It remains to be seen whether the courts will hold that when a party promises to negotiate it also, by implication, promises to do so in good faith. It is also unclear how such a duty would interact with express agreement to negotiate in good faith since one wonders how an express obligation rendered unenforceable for uncertainty can nevertheless be resurrected in some form as an implied term.

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