

CONTRACTS EXPRESSLY PROVIDING FOR FURTHER AGREEMENT

MICHAEL HOWARD*

Introduction

The purpose of this article is to consider ways in which problems, which are created by contracts which expressly provide that a term of importance is to be agreed upon by the parties at some time in the future, can be satisfactorily resolved by the courts. It has been stated that "To be a good contract there must be a concluded bargain and a concluded bargain is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties."¹ An application by the courts of the principle contained in this statement has usually² resulted in a refusal to uphold dealings which expressly provide that a term of importance is to be fixed by further agreement between the parties themselves.

The principal difficulty facing the courts with problems of this character is that they have in some way to give effect to expressions of intention which are contrary. On the one hand the parties have agreed to be bound to terms of importance but, at the same time, they have expressly agreed that they do not want to be bound immediately to another term of importance; "at a price to be agreed" for example. The basic objection to the usual judicial approach, which refuses to uphold such agreements,³ is that it places too much emphasis upon the presence of the term "to be agreed" and thus tends to ignore completely the parties' expressed intentions to be bound to all the other terms of importance.

Where the parties leave a number of terms to be fixed in the future it is reasonable that the court would not uphold such an arrangement because the parties would appear to be still in the process of negotiation. In the absence of performance of the particular obligations, or perhaps a course of dealing between the parties, there would be no clear evidence of an intention to be bound. Thus, by refusing to uphold this arrangement, the court would be giving effect to the parties' intentions. However, for the purposes of this article, it will be assumed that there is evidence of an overall intention to be bound in spite of the fact that a term of importance has not been fixed at the time of contracting. It is not suggested that the intention of the parties to be "unbound" as to a particular term should be just ignored

* Ph.D.(B'ham), Senior Lecturer in Law, University of Tasmania.

1 Per Viscount Dunedin in *May & Butcher Ltd. v. The King* [1934] 2 K.B. 17n., 2ln.

2 See, however, cases such as *Foley v. Classique Coaches Ltd.* [1934] 2 K.B. 1 and *F. & G. Sykes (Wessex) Ltd. v. Fine Fare Ltd.* [1967] Lloyd's Rep. 53.

3 See, for example, *Loftus v. Roberts* (1902) 18 T.L.R. 532 ("at a West-end salary, to be mutually arranged between us"); *British Homophone Ltd. v. Kunz* (1935) 152 L.T. 589; *May & Butcher Ltd. v. The King*, supra n.1 ("the price or prices to be paid, and the date or dates on which payment is to be made . . . shall be agreed upon from time to time . . ."). Cf. *R. & J. Dempster Ltd. v. Motherwell Bridge & Engineering Co. Ltd.* 1964 S.L.T. 353 where the contract was upheld even though it provided that "the prices to be settled at a later date".

but, once it has been accepted that in the circumstances of the particular case there is evidence of an intention to be bound, then it would seem that the only reason for refusing to assist the parties to carry out their intention would be the fact that they had not agreed upon *all* the terms at the time of contracting. It is submitted, however, that this is not a satisfactory reason for defeating the parties' expressed intention to be bound.

An attractive judicial approach to the problem can be illustrated by reference to such cases as *Foley v. Classique Coaches Ltd.*⁴ ("at a price to be agreed by the parties in writing and from time to time") and *F. & G. Sykes (Wessex) Ltd. v. Fine Fare Ltd.*⁵ ("such other figures as may be agreed between the parties hereto"). In both cases the court was more concerned with upholding the parties' intentions to be bound, as evidenced by their performance of the contractual obligations over a period of time, than with the term "to be agreed", and the presence of such a term certainly did not deter the court from upholding the contracts in both cases. It is submitted that the same approach can be adopted in any other case where the court is satisfied of the existence of an intention to be bound. Performance of the contractual obligations clearly was important evidence in both cases⁶ but it is submitted that this ought not to be regarded as the only satisfactory evidence and agreement upon all the other terms of importance could equally be regarded as sufficient evidence of an intention to be bound.

Before considering an approach to the problems which places less emphasis upon the term "to be agreed" and examines the ways in which the courts may be able to give effect to the parties' intentions to be bound, it is suggested that it is of value to identify the problem more particularly and isolate it from others which are often lumped together under the general heading of "Uncertainty".

It is necessary to distinguish the present problem from difficulties created by either incompleteness or indefiniteness. In the case of "incompleteness" the parties have either deliberately or inadvertently left gaps in their contract which the court in most cases can fill without difficulty with the help of objective criteria. With "indefiniteness" the problem before the court is that of being unable to give a sufficiently definite meaning to the language used by the contract. These difficulties are illustrated by such cases as *G. Scammell & Nephew Ltd. v. H. C. and J. C. Ouston*⁷ ("the balance of purchase price may be had on hire-purchase terms over a period of two years"), *Bishop & Baxter Ltd. v. Anglo-Eastern Trading & Industrial Co. Ltd.*⁸ (a purported acceptance "subject to war clause") and *British Electrical & Associated Industries (Cardiff) Ltd. v. Patley Pressings Ltd.*⁹ ("subject to *force majeure* conditions"). The courts could not uphold these contracts because they could not give a particular meaning to the phrases used which were capable of a variety of meanings. However, if the contract provides, for

4 *Supra* n.2.

5 *Supra* n.2.

6 Notice also the presence of an arbitration clause in both cases. The courts attached importance to these but no doubt they would have been capable of determining a "reasonable price" (*Foley*, *supra* n.2) or a "reasonable quantity" (*Sykes*, *supra* n.2) for themselves.

7 [1941] A.C. 251.

8 [1944] K.B. 12.

9 [1953] 1 W.L.R. 280.

example, that the “price is to be agreed” there is nothing indefinite in the language used and the meaning is quite clear. In addition there is no gap in the contract. The parties have thought about the matter and, unlike the situation where there is a gap in the contract, they have expressly provided for further agreement.

The present problem should also be distinguished from either the “contract to enter into a contract” or the “contract to negotiate”. It has been recently stated by Denning M.R. that “It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law.”¹⁰ With respect, there is no reason to suppose that the contract which provides that the parties are to conclude a contract is not perfectly valid.¹¹ In relation to the “contract to negotiate” there is room for the view that the court ought to provide a remedy for a failure to negotiate in good faith where the parties have expressly agreed to do this.¹² It is suggested, however, that any analysis which may be of assistance for the purposes of upholding either type of dealing would not help with the different problem being considered. Finally, it may be noticed that the phrase “an agreement to agree” has often been used to describe in vague, general terms the problem under consideration. The expression is clearly ambiguous and unhelpful. It is suggested that it is better to avoid its use altogether.

It is now proposed to review different contractual terms in different types of contract which have come before the courts and consider the ways in which they may be able to assist the parties to carry out their intention to deal, as evidenced by reference to the terms upon which they have agreed. The scheme will thus be:

- A. CONTRACTS FOR THE SALE OF GOODS
 - I. Price
 - II. Other Terms
 - 1. *Time provisions in relation to delivery and payment*
 - 2. *Mode of payment in credit sales*
- B. OTHER CONTRACTS
 - I. Leases
 - 1. *Options to renew*
 - 2. *Options to purchase*
 - II. Insurance Contracts
- C. PERFORMANCE — CONTRACTS IMPLIED FROM CONDUCT
 - A. CONTRACTS FOR THE SALE OF GOODS
 - I. Price

If the contracting parties agree upon all the terms except the price term and there is no mention of price in the contract it is significant that the courts would have no difficulty at all in filling this gap and upholding the contract by the use of a “reasonable price”.¹³ The court, regarding the parties as reasonable people who would have agreed upon a reasonable price, will assist them to carry out their contractual intentions. However,

10 *Courtney & Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd.* [1975] 1 W.L.R. 297, 301.

11 See *Morton v. Morton* [1942] 1 All E.R. 273, noted (1942) 6 M.L.R. 81.

12 See Knapp, “Enforcing the Contract to Bargain” (1969) 44 N.Y.U.L.R. 673.

13 *Hoadly v. M'Laine* (1834) 10 Bing. 482; 131 E.R. 982.

merely because the parties have not yet agreed upon a price when they previously stated that they would does not appear to be a sound reason for refusing to use the machinery of the “reasonable price” and, in effect, treating the parties as unreasonable people.¹⁴

Just as it is reasonable for the parties to leave a gap in their contract until more is known of the market for the goods somewhere nearer to the time contemplated for delivery, it is equally sensible for the parties to provide in their contract that they will fix the term at some later date. It is submitted, therefore, that decisions such as *May & Butcher Ltd. v. The King*¹⁵ should be regarded as supporting a commercially unsound approach to the problem of the price “to be agreed”. Where the parties have stated their intention to agree upon a price and have failed to do so when negotiations break down, it is submitted that this is a gap which the courts can properly fill by means of the objective standard of the “reasonable price”.

II. Other Terms

It seems clear that the courts will not be able to assist the parties to carry out their intentions to be bound in relation to all terms of importance. With regard to quantity, for example, it would be quite inappropriate because, in the absence of a previous course of dealing, it would usually¹⁶ be impossible to determine what would be a reasonable quantity where it was provided that the quantity was “to be agreed”. However, it is submitted that assistance may be able to be provided in relation to the following terms —

1. *Time provisions in relation to delivery and payment*

The various Sale of Goods Acts provide¹⁷ that, unless otherwise agreed, payment and delivery are deemed to be concurrent obligations. Thus, neither is a condition precedent to the other and the seller must be ready to give possession of the goods to the buyer in exchange for the price and, in turn, the buyer must be ready to exchange the price for possession of the goods. This implication will obviously be negated where the parties have either expressly or impliedly agreed that the time for payment shall be different from the time for delivery and this possibility of a contrary intention is expressly provided for in the Sale of Goods Acts.

Would the implication be negated if the contract provided, for example, that the time for delivery was “to be agreed” but the time for payment was fixed or vice versa? It could be argued, on an analogy with the situation where the time for payment is fixed and there is a gap as to delivery and the time for payment would fix the time for delivery, that in the same way the term “to be agreed” could be regarded as being fixed by reference to the term which has been settled. On this view it could not be argued that there was no contract by virtue of the term “to be agreed” because the parties themselves could be regarded as having impliedly fixed that term.

14 “If the parties say nothing about the price, the contract will be enforced at a reasonable price, upon the supposition that that is what the parties intended. If they leave the price to be agreed, the contract fails, apparently upon the theory that they do not intend to agree upon a reasonable price”: Prosser, “Open Price in Contracts for the Sale of Goods” (1932) 16 Minn. L.R. 733, 774.

15 *Supra* n.1.

16 But see *F. & G. Sykes (Wessex) Ltd. v. Fine Fare Ltd.*, *supra* n.2.

17 See, for example, Sale of Goods Act 1908 (N.Z.), s.30.

Where both time for delivery and for payment are “to be agreed” it is submitted that, consistent with the suggested approach to the price term, the court could fix a reasonable time having regard to the nature of the deal, where the parties failed to do this by the time a dispute arises.

2. *Mode of payment in credit sales*

The phrase “mode of payment” can be used to describe any term which provides for the way in which the purchaser is required to discharge his obligation as to the price term. This may relate to the whole amount (e.g. “upon hire-purchase terms to be agreed”) or the balance after payment of a deposit as in *DeLaval v. Bloomfield*¹⁸ (“\$200 Nov. 1, 1937, bal to be arranged”). The contract may provide in either case that the parties are to agree in the future as to the time within which the obligations are to be discharged.

It is submitted that these are all matters which a court ought to be well able to determine by using an objective standard of what is fair and reasonable in the circumstances of the particular case. Thus, taking the facts of *DeLaval v. Bloomfield*, there was a written contract for the sale of machinery where all the terms of importance were fixed including the price term which was \$400: “\$200 Nov. 1, 1937, bal to be arranged.” The parties clearly intended to be bound and a satisfactory approach would have been to uphold the contract by fixing “reasonable terms” for the payment of the balance of the purchase money. Applying a traditional approach the contract would not have been upheld. In fact, the Ontario Court of Appeal held that, because the defendant purchaser had refused to make any arrangements with regard to the balance, the plaintiff was entitled to claim the instalment of \$200.¹⁹ *DeLaval v. Bloomfield*²⁰ was disapproved of in *Cherewick v. Moore and Dean*²¹ where it was stated that the court should not treat a refusal of the defendants to enter into an agreement, as to the method of payment, as entitling the plaintiff to immediate payment. Although not agreeing with the decision in *Cherewick’s* case (that there was no enforceable contract where the manner and time of payment were left unsettled in a licensing agreement) we would agree with the court that in *DeLaval v. Bloomfield*²² there was no “breach” of “an agreement”. This was clearly not the view of the court in *DeLaval v. Bloomfield* where it was said that:²³ “His breach of his agreement to arrange the mode of payment gives the plaintiff a right of action.” This approach is really treating the arrangement as a “contract to negotiate in good faith”. It is submitted, however, that the circumstances will usually indicate that, where the contract provides that a term is “to be agreed” this should be construed as a statement of intention rather than a promise.²⁴

18 [1938] 3 D.L.R. 405.

19 The Court applied *Hall v. Condor* (1857) 2 C.B. (N.S.) 22; 140 E.R. 318.

20 *Supra* n.18.

21 [1955] 2 D.L.R. 492.

22 *Supra* n.18.

23 *Ibid.*, 409.

24 See *Willets v. Ryan* [1968] N.Z.L.R. 863 as an extreme example of the traditional approach. It was held that there was no contract for the sale of land where all the terms were agreed upon including the deposit because it was provided that the balance of the purchase price was to be paid “by mutual agreement”. There was clearly an intention to deal and, in addition, it could be said that the purchaser would have been unlikely to have disagreed with any method of paying the balance which the vendor may have suggested. In any event it is submitted that the court could have used objective criteria without difficulty to determine reasonable terms of payment.

B. OTHER CONTRACTS

I. Leases

1. *Options to renew*

In *King's Motors (Oxford) Ltd. v. Lax*²⁵ it was stated that "In substance it amounts to no more than a contract to enter into a contract which is always given as the classic example of an agreement which is unenforceable,"²⁶ and the court refused to uphold an option to renew a lease "at such rental as may be agreed upon between the parties hereto". However, as Williston has pointed out,²⁷ "On the contrary, some courts, recognising the practical business utility of such clauses in a lease, treat them as sufficiently definite by interpreting them as meaning a reasonable rental under the circumstances in case the parties cannot agree."

It is interesting to observe the approach of the New Zealand Court of Appeal in the recent case of *Attorney-General v. Barker Bros. Ltd.*²⁸ The right of the Crown to renew a lease which provided that "The terms and conditions of any such renewed lease shall be as agreed upon by the parties at the time, but the rent shall not be less than the amount payable hereunder" was upheld. The Crown had objected to the suggested new rental and had sought the respondent's agreement to submit to arbitration in accordance with a clause in the lease. The respondent then contended that the renewal clause "did not create a binding right of renewal". This argument was rejected, the Court of Appeal regarding the arbitration clause as providing effective machinery for the settlement of the renewal terms — "The authorities are clear that an appropriately worded arbitration clause can fill the gap even where the parties, on the face of their bargain, have left some important terms to be agreed between them."²⁹

Having referred to both *Foley's* case³⁰ and *Sykes' case*³¹ at some length, it is of interest to note the following comment by the President who delivered the leading judgment: "It must, however, be accepted that in *F. & G. Sykes (Wessex) Ltd. v. Fine Fare Ltd.* the members of the court seem to have placed reliance not only on the arbitration clause but also on *their ability to imply a term that the number of chicks would be reasonable.*"³² However, "I accept that it is not too easy in the present case to adopt precisely the same process of implication as was adopted in *Foley v. Classique Coaches Ltd.* and *F. & G. Sykes (Wessex) Ltd. v. Fine Fare Ltd.* I would, therefore, prefer to approach the problem somewhat differently."³³ The President then relied upon the presence of the machinery of the arbitration clause to uphold the renewal of the lease although there was no indication given as to why it would have been difficult for the Court itself to determine a reasonable rental in the circumstances. It would seem that the Court's difficulty would have been no more or no less than that of the arbitral body ultimately appointed to determine a reasonable rental.

25 [1970] 1 W.L.R. 426, 428.

26 It has already been suggested, *supra* at 000, that a contract to enter into a contract is perfectly valid. It bears no relation to the problem which occurred in the *King's Motors' case*.

27 *Williston on Contracts* (1967) Vol. I, 151.

28 [1976] 2 N.Z.L.R. 495.

29 *Ibid.*, 500.

30 *Supra* n.2.

31 *Supra* n.2.

32 *Supra* n.28 at 502 (emphasis added).

33 *Ibid.*, 503.

As a final point it should be remembered that the lessee is likely to have entered into the contract and performed his obligations under the lease in reliance upon the granting of the option to renew. In these circumstances the court ought to be very reluctant to regard the option as being unenforceable. This unsatisfactory result can be avoided by rejecting the traditional attitude³⁴ and adopting the more reasonable approach which is supported by some American authority.³⁵

2. Options to purchase

Assuming for a moment that there is no existing contractual relationship between the parties in the form of a lease, it is arguable that a court would order specific performance of a contract for the sale, for example, of a house where the price was stated but upon "terms to be agreed", the time for payment and the security for deferred payments being not yet settled. However, it is submitted that the court will not order specific performance where the contract for the sale of real property provides that the price is "to be agreed". "With regard to land, the law of specific performance of contracts to sell is founded on the principle that the advantage of possession of a particular piece of land may be inestimable, and no amount of money may be assessable as an exact equivalent for it"³⁶ The particular property would not have a market value which could be ascertained by the court. Thus, a price gap in such a contract could not be filled by the use of an objective standard and, for the same reason, the position would be the same where the price was "to be agreed". Again, the court could not use the standard of a "reasonable" price.

However, the position may be quite different in the situation where a lessee, in reliance upon an option being granted, has occupied the premises under the lease (and perhaps made improvements). There is some American authority³⁷ supporting the view that in this case, in order to protect the "reliance interest" of the lessee, the landlord would be required to agree with the plaintiff upon reasonable terms of payment.

II. Insurance Contracts

Section 31(1) of the New Zealand Marine Insurance Act, 1908, provides that "Where an insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable." This provision would appear to cover the situation where either there is no mention at all of the premium or where it is expressly provided that the premium is "to be arranged". The first category would be consistent with the analogous situation where there is a contract for the sale of goods where the court will fill the gap if there is no mention of the price term.³⁸ The second category supports the argument which has been advanced in relation to the problem where goods are to be sold "at a price to be agreed".

34 See, for example, *King's Motors (Oxford) Ltd. v. Lax*, supra n.25. See *Eudunda Farmers Co-operative Society Ltd. v. Mattiske* [1920] S.A.L.R. 309; *Randazzo v. Goulding* [1968] Qd. R. 433; *Aitken v. Regent Theatre Co. Ltd.* [1934] G.L.R. 331, for examples in Commonwealth jurisdictions.

35 See *Corbin on Contracts* (1963) Vol. I, 72-74.

36 *Williams on Vendor and Purchaser* (4th ed. 1936) Vol. I, 4, n. (r).

37 See *Corbin on Contracts*, supra n.35 at 72 and cases cited therein. Cf. *Re W. G. Apps & Sons Pty. Ltd. and Hurley* [1949] V.L.R. 7 and *Murphy v. McSorley* [1929] 4 D.L.R. 247.

38 *Hoadly v. M'Laine*, supra n.13.

It has been suggested³⁹ that the same approach ought to be adopted in relation to non-marine insurance contracts. This seems reasonable provided that there are no other provisions, related to the premium "to be arranged", which cannot be determined by reference to what is reasonable. This happened in the case of *American Airlines Inc. v. Hope*⁴⁰ where it was provided in a war risks clause that the leading underwriter was to agree to an additional premium and geographical limits with the insurers ("at A. P. and Geographical Limits t.b.a. L/U"). As Denning M.R. pointed out,⁴¹ geographical limits "... cannot be decided by resort to reasonableness. There can be no cover for war risks until they are agreed."

C. PERFORMANCE — CONTRACTS IMPLIED FROM CONDUCT

Reference has been made to the significance which the courts will attach to the performance of obligations under the original contract and this is well illustrated by *Foley's case*⁴² and *Sykes' case*.⁴³ It was also noticed in relation to leases, whether the question was the renewal of the lease or an option to purchase contained in the lease, that the fact that the lessee had performed his obligations under the lease is a matter of importance.

However, in exceptional circumstances the court may take the view that the effect of performance is to create a separate contract which has the effect of superseding the original contract which contains a term "to be agreed". An interesting example of the operation of this device is the case of *British Bank for Foreign Trade v. Novinex*⁴⁴ which the court referred to as a contract implied from conduct. The plaintiff had performed his part of the bargain where the defendant had agreed to "cover you with an agreed commission on any other business transacted with your friends." It is clear that no amount of performance by the plaintiff would have helped to determine "an agreed commission" under the original arrangement. The court implied a contract by conduct and then required the defendant to pay a reasonable commission. Although the court did not say so, this contract was clearly a new one, which superseded the old (and in the court's view unenforceable) contract and required the defendant to pay reasonable compensation for the service rendered to him by the plaintiff.

Although the use of this technique would appear to have been unnecessary in the *Novinex* case, because the court could have determined a reasonable commission under the original agreement, it will serve a useful purpose where the original contract cannot be upheld. *Bishop & Baxter Ltd. v. Anglo-Eastern Trading & Industries Co., Ltd.*⁴⁵ illustrates this although the case was not concerned with a term "to be agreed" but with the different problem of the indefinitely expressed term (the defendant's purported acceptance contained the phrase "subject to government restriction as to sales and war clause"). In spite of the fact that this "acceptance" amounted to a counter-offer which contained the phrase, "war clause", to which the court could not give a particular meaning, it was held that the seller was entitled to the contract price of the goods which had been delivered and accepted by the buyer.

39 *Chitty on Contracts* (23rd ed. 1968) Vol. II, 499, n.75.

40 [1973] 1 Lloyd's Rep. 233.

41 *Ibid.*, 241.

42 *Supra* n.2.

43 *Supra* n.2.

44 [1949] 1 K.B. 623.

45 *Supra* n.8.

Conclusion

In spite of assertions that the courts “will not make a contract for the parties”, cases such as *Foley v. Classique Coaches Ltd.*⁴⁶ and *F. & G. Sykes (Wessex) Ltd. v. Fine Fare Ltd.*⁴⁷ clearly show what the courts can do to uphold contracts where the parties have shown an intention to deal in spite of the fact that the contract contains a term “to be agreed”. It is submitted that a more attractive approach and a more commercially realistic attitude would result if the courts were to place more emphasis on the terms upon which the parties have agreed, together with any other evidence of an intention to be bound, rather than upon the term “to be agreed.”

46 *Supra* n.2.

47 *Supra* n.2.