



Casenotes



Agreements to negotiate in good faith

LAING O'ROURKE (BMC) PTY LTD v TRANSPORT INFRASTRUCTURE DEVELOPMENT CORP

[2007] NSWSC 723; BC200705559

The NSW Supreme Court has affirmed that an agreement to negotiate in good faith in the absence of an objective yardstick by which to measure the good faith of a negotiating party's stance is unenforceable.

Contractual provisions

The context of the case was the contractual scheme involved in the development of the new transport interchange at Chatswood on the Sydney North Shore railway line. The first defendant, Transport Infrastructure Development Corp (TIDC), entered into a development deed with the second defendant, CRI Chatswood Pty Ltd (CRI), which set out the terms on which the works were to be delivered. CRI then engaged the plaintiff, Laing O'Rourke Pty Ltd, under a design and construct contract (the D&C Contract). The D&C Contract reproduced a large number of provisions from the development deed, such that the two operated as 'back-to-back' contracts. TIDC, CRI and the plaintiff then also entered into an independent certifier deed (ICD) with an independent certifier who was to perform various services as described in the ICD.

At issue in the case were the alternative dispute resolution provisions in the ICD and the D & C Contract.

Clause 13.2(c)(i) in the ICD provided that, in the event of a dispute, the parties would 'meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference' and cl 13.2(c)(ii) provided that, in the event that the parties could not resolve the dispute via the negotiations, they pledged to 'endeavour to agree upon a procedure to resolve the dispute or difference'.

Clause 27 in the D&C Contract provided for its own dispute resolution

process, which was identical to that in the development deed. However, cl 27.17 in the D&C Contract also specified, inter alia, that the plaintiff and CRI were bound to the outcome of a dispute determined between TIDC and CRI under the development deed where there were like matters arising in respect of the respective rights and obligations of the plaintiff and CRI.

Facts

In February 2006, the plaintiff and CRI applied for extensions of time under the applicable provisions of the development deed and the D&C Contract. These were ultimately granted by the independent certifier. TIDC challenged the validity of the approved extensions of time and sought to invoke the dispute resolution provisions in the development deed. Once procedures under the dispute resolution clause of the development deed were set in motion, TIDC separately sought to invoke the dispute resolution provisions in the ICD in relation to the same extension of time determinations.

On 8 June 2007, the plaintiff successfully moved the court for injunctive relief inhibiting further use of the dispute resolution procedures under the development deed and D&C Contract arguing that cl 13 of the ICD was the only appropriate dispute resolution procedure.

The plaintiff then sought an order for a permanent injunction.

Issues

There were two primary issues before Hammerschlag J in determining whether an injunction should be granted to the plaintiff. The first was whether cl 13 in the ICD was the only avenue for resolution of the extension of time dispute. Key to this consideration was whether cl 13 was void for uncertainty as an agreement to negotiate in good faith, and, if so, whether the development deed and D&C Contract's dispute resolution clauses were also void because they were in terms indistinguishable from cl 13.

The second issue was whether cl 27 of the D&C Contract was invalid because it purported to oust the jurisdiction of the court.

Effectiveness of cl 13: agreements to negotiate in good faith

Hammerschlag J noted that it was settled law that an agreement to agree is too uncertain to be enforceable and judicial authority favoured the view that a bare agreement to negotiate similarly lacks certainty. For example, in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709, Giles J held (at 714) that a mediation agreement which provided that 'each party confirms that it enters into this mediation with a commitment to attempt in good faith to negotiate towards achieving a settlement of the dispute' was not sufficiently certain to be given effect. Similarly, in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 41–42, Handley JA commented that because negotiations are conducted at the discretion of the parties, 'a promise to negotiate in good faith is illusory and therefore cannot be binding'. The uncertainty in these cases, Hammerschlag J explained, arose because of the inevitable tension between negotiation, in which a party is free to negotiate in its own interest, and an obligation to have regard to the interests of the other party.

His Honour also considered authorities which have suggested that an explicit promise to negotiate in good faith may be sufficiently certain to be contractually binding depending on its terms. In *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*, Kirby P held (at 27) that:

In a small number of cases, by reference to a readily ascertainable external standard, the court may be able to add flesh to a provision which is otherwise unacceptably vague or uncertain or apparently illusory ...

In *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, Einstein J also disagreed with the argument that a good faith requirement in negotiations is too vague and uncertain to be meaningfully enforced, and challenged the 'lynch pin' argument

that the tension between negotiation according to self interest and the maintenance of good faith defeated the enforceability of a good faith requirement in negotiation.

However, Hammerschlag J noted that it was not the tension between negotiation according to self interest and the maintenance of good faith which was crucial to rendering a good faith requirement in negotiation unenforceable. Rather, Hammerschlag J noted (at [50]) that it was:

... the absence of an objective yardstick by which to measure the good faith or otherwise of a negotiating party's stance. An appropriate (and indeed often effective) negotiating strategy may be a refusal to negotiate.

On this basis, his Honour held that cl 13.2(c)(i) was uncertain and unenforceable.

Clause 13.2(c)(ii) stood on even less stable ground, having 'the additional difficulty that it does not have even the yardstick of good faith' and was 'clearly simply an agreement to agree' (at [53]).

Since cl 13.2 was void, it followed that cl 27.2(c) and (d), which were framed in the same terms as cl 13.2, were also unenforceable. However, Hammerschlag J found that the intention of the parties as garnered from the operation of the development deed and the D&C Contract was that a finding of unenforceability in the negotiation provisions should not impair the operation of the entire provision.

The ouster issue

The second argument which the plaintiff sought to advance was that cl 27.17 in the D&C Contract ousted the jurisdiction of the court by binding the plaintiff to the outcome of a dispute determined between TIDC and CRI under the development deed. The effect of cl 27.17, the plaintiff submitted, was to leave the plaintiff without remedies that would be otherwise be available to it to impeach the arbitration under the provisions of the *Commercial Arbitration Act 1984* (NSW) and thereby ousting the court's jurisdiction. Hammerschlag J noted (at [126]) that the plaintiff relied upon *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643, which referred to

the invalidity of contractual provisions which attempt to disable a party from resorting to the courts.

However, Hammerschlag J quickly rejected this argument, stating that by binding the plaintiff contractually to CRI in respect of the outcome of the arbitral process between CRI and TIDC, cl 27.17 did not effect an ouster. His Honour reasoned that the court retained its jurisdiction to determine whether the dispute was agreed or determined within the terms of the Development Deed and that the High Court had explicitly noted in *Dobbs v National Bank of Australasia Ltd* (at 654) that 'the rule against ousting the jurisdiction of the Court' did not prevent parties from 'giving a contractual conclusiveness to a third person's certificate'.

Decision

Ultimately, the plaintiff failed on the basis that cl 13 was ineffective while cl 27 remained operative even though cl 27.2(c) and (d) were unenforceable.

Implications

Laing O'Rourke v Transport Infrastructure shows that while courts have recognised that some contracts to negotiate in good faith will be enforceable at law, the presence of an objective yardstick by which to measure the good faith or otherwise of a negotiating party's stance is key to its validity. In *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd* [2007] FCA 1066, BC200705750, decided a week after *Laing O'Rourke v Transport Infrastructure*, the Federal Court determined the same issue on similar terms, emphasising the need for objective criterion by which a party's bargaining is to be judged to lend content to an otherwise hollow requirement. Simply stating that parties must 'endeavour to agree' or undertake 'good faith negotiations' is insufficient.

The case also highlights the difficulties with overlapping alternate dispute resolution clauses that can haunt complex contractual arrangements in the construction industry. ●

Christopher Kerin, Senior Associate, and Alice Lam, Paralegal, Holding Redlich, Sydney.