While negotiated settlements should obviously be encouraged and the Federal Court may become increasingly active in referring claims to mediation, the Court and, particularly, the principal parties will need to ensure that any negotiated settlement is achieved through an inclusive process. The conduct of native title claims involve unique difficulties, primarily because of the large number of parties and interests involved, the complexity, and potentially emotive nature, of the issues and the logistics of ensuring that all interested parties are informed of and included in the claims process.

The applicants, the State and some industry bodies play by far the major role in native title claims in Western Australia. Most respondents do not actively participate. For this reason the principal parties will have a very significant influence in any negotiated outcome. Nevertheless, all stakeholders need to be properly included in the process, otherwise there will be resistance to settlement and less satisfaction with the outcome.

The Nharnuwangga settlement also showed that, apart from the effect of a settlement on existing interest holders, native title applicants and the State may agree upon significant changes to native title procedures relating to future land dealings and development within the determination area. This may affect the grant of mining tenements and the conduct of mining operations. The mining industry will need to consider the extent to which it should collectively become involved in native title claims and settlement negotiations.

While a negotiated settlement may not be a realistic possibility in many native title claims, and the process of negotiation and mediation needs to be carefully managed, the Nharnuwangga settlement is an important step forward in the resolution of native title issues in Western Australia.

FLETCHER CHALLENGE ENERGY LIMITED V ELECTRICITY CORPORATION OF NEW ZEALAND LIMITED[1]

James Willis*

Gas contract - Heads of agreement – Enforceability - Intention of parties – whether complete and certain – "all reasonable endeavours" clause

BACKGROUND

The case concerned the enforceability of a "Gas Contract Heads of Agreement" ("the HoA") entered into on 28 February 1997 between New Zealand's largest oil and gas producer, Fletcher Challenge Energy Limited ("FCE") and New Zealand's then largest electricity utility, Electricity Corporation of New Zealand Limited ("ECNZ"). FCE contended that the HoA was a binding and enforceable contract. ECNZ argued that FCE was seeking to turn an incomplete and unsuccessful negotiation into a binding contract for the supply of gas worth between NZ$1.2 and 1.8 billion over a seventeen year term.

There were three main issues in the case:

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1 High Court, Wellington, unreported 9 June 2000, CP 412/98.

* Bell Gully, Wellington, New Zealand.

- Did the parties intend to be bound by the HoA?
- Was the HoA a complete contract and was it sufficiently certain to be enforceable?
- Did ECNZ fail to meet the obligation contained in the HoA that it would use "all reasonable endeavours to agree to a full sale and purchase agreement?".

FACTS

The parties negotiated unsuccessfully in 1995 for ECNZ to obtain from FCE a gas supply for its Huntly power station beyond 2002.

During 1996 the parties discovered that they were the only bidders for a 40% interest held by Western Mining Corporation ("WMC") in the Kupe gas field. FCE consequently approached ECNZ with a view to a mutually beneficial proposal. This approach eventually resulted in a letter of agreement signed by the parties' respective CEOs on 28 February 1997 (Fletcher/Frow letter). Amongst other things, the Fletcher/Frow letter provided that the parties would enter into a HoA for long term gas supply by the end of the day and specified some essential terms. It was stated that the HoA was conditional on ECNZ Board approval within 13 days.

On 27 and 28 February, the parties met to negotiate the HoA. The HoA was signed toward the end of the afternoon on 28 February by Mr Taylor for ECNZ and Mr Kirk for FCE. It covered some three and a half pages.

Pursuant to the Fletcher/Frow letter, both parties resubmitted their previous bids to WMC for its stake in Kupe. On 4 March 1997, WMC advised FCE that its bid had been accepted. On 12 March ECNZ's Board approved the HoA.

The parties then agreed that for the remainder of March 1997 they would focus their efforts on the agreements necessary to complete the purchase of WMC's stake in Kupe. Those agreements were signed on 14 and 27 March 1997. Negotiations for the full Sale and Purchase Agreement contemplated by the HoA began with a meeting on 3 April 1997.

Full agreement was not reached. FCE alleged that the HoA was a binding agreement and that ECNZ had breached the "reasonable endeavours" obligation. FCE further contended that ECNZ made a deliberate decision not to reach full agreement because the price of electricity had changed in the interim and it wanted out of the deal. Eventually proceedings were commenced in the High Court which resulted in a 16 day trial in March and April 2000. Wild J delivered judgment on 9 June 2000.

THE GENERAL APPROACH TO CONTRACT ENFORCEMENT

Wild J first endorsed the aim and approach of the law in this area as detailed in *Hillas & Co. Ltd v Arcos Ltd*[2]:

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2 (1932) 147 LT 503, 512.

> "...the problem for a court of construction must always be so to balance matters, that without violation of essential principle the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains."

His Honour held that while this was directed to Courts in their construction of contracts, it applied equally to a Court determining whether a contract was formed at all. The Court also noted the approach set out in *Attorney-General v Barker Bros. Ltd*[3]:

> "If, however, the Court is satisfied that the real intention of the parties was to enter into an immediate and binding agreement then the Court will do its best to give effect to that intention..."

DID THE PARTIES INTEND TO BE BOUND BY THE HoA?

Against the background of that general approach, Wild J outlined the following legal principles:

- In order for the HoA to be binding the parties must have intended the HoA to bind them from the date of its execution. The existence of the all reasonable endeavours/full agreement clause in the HoA does not necessarily mean that the HoA is not binding. *France v Hight*[4] was relevant where it was said:

  > "...In each case the Court has got to make up its mind on the construction of the documents and on the general surrounding circumstances whether the (HoA was) not to have contractual force until a (full agreement) was signed..."

- He then cited with approval a number of factors relevant for determining whether the parties intended to be bound as suggested by Professor McLaughlin in his article "Rethinking Agreements to Agree"[5] which factors were endorsed by Barker J in *Spengler Management Ltd v. Tan*[6]. Those factors are:

  (a) the importance and complexity of the transaction;

  (b) the degree of formality/informality and the terminology of the agreement (e.g. was there a signed agreement, an exchange of correspondence or only an oral exchange);

  (c) the amount of detail settled by the agreement;

  (d) the parties' previous dealings and their conduct at the time of and following the agreement;

  (e) any actions taken in reliance upon or part performance of the agreement;

  (f) the fact that the agreement is one of a series of inter-related agreements between the parties.

- The test of intention is an objective one i.e. the parties will be bound by their informal agreement if it can be reasonably inferred that they intended to be immediately bound and regarded the later document as merely giving more formal expression to their mutual commitments (p 12).

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3 [1976] 2 NZLR 495, 498 (Court of Appeal).
4 [1990] 1 NZLR 345, 353 (Court of Appeal).
5 (1998) 18 NZULR 77.
6 [1998] 1 NZLR 120.

Wild J applied factors (a) to (f) to the case. His Honour reached a "firm view" having considered the HoA itself, the evidence of experts, the commercial circumstances in which it was concluded, and the subsequent conduct of the parties, in particular their communications with each other and with third parties, that the parties intended the HoA to bind them from the time it was signed on 28 February 1997.

WAS THE HoA COMPLETE AND ENFORCEABLE?

To deal with this issue two aspects of the HoA had to be considered:

- Was it a complete contract?
- Were its terms sufficiently certain?

However, having found that the parties intended to be bound by the HoA, Wild J approached the issue of the enforceability of the HoA pre-disposed toward upholding and giving effect to it.

Was the HoA a complete contract?

Wild J outlined the following legal principles:

- His Honour rejected ECNZ's proposed test of essentiality and adopted the test proposed by FCE; does the HoA contain all the terms necessary to make it workable?
- He noted but did not follow ECNZ's submission that the HoA had to be a complete/ concluded bargain to be enforceable. This was the *May & Butcher* line of authority,[7] in which Viscount Dunedin said:

  > "...To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties."[8]

  May & Butcher had been applied by the New Zealand Court of Appeal in *Willetts v Ryan*[9] and *Barrett v IBC International Ltd*[10].

- He noted FCE's submission regarding the two different and firmly established lines of authority (*May & Butcher,* and *Hillas & Co Ltd*) when parties to an agreement have expressly left some aspect of the transaction to be resolved at a future time.
- Of interest to the legal academic community, Wild J referred to and agreed with references in Professor McLaughlin's article "Rethinking Agreements to Agree"[11] where the author outlined modern American law on agreements to agree:[12]

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7 [1934] 2 KB 17.
8 at 21.
9 [1968] NZLR 863.
10 [1995] 3 NZLR 170.

> "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the Court.
>
> The fact that a term is left open "may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance", but if the parties' intention to conclude a bargain is otherwise established, the contract will only fail if the Court is unable to settle on a term that is 'reasonable in the circumstances'."

- Wild J thought it was open to the Court adopt the position set out in the American restatement for two reasons. First, by distinguishing *Barrett* and *Willetts* on the basis that they were property conveyance cases. Secondly, because both Cooke P and Hardie Boys J had expressed obvious dissatisfaction with the result they felt constrained to reach.

  Wild J also noted that the touchstone in *Attorney-General v Barker Bros. Ltd*[13] was whether the parties intended to be bound. If yes, "then the Court will do its best to give effect to that intention" (i.e. will mirror the approach in *R & J Dempster Ltd v The Motherwell Bridge and Engineering Company Limited*[14]

- Wild J also noted the article "Pre-Contractual Liability"[15] where Professor Farnsworth wrote that if no agreement is reached on open terms in a contract the parties are bound by their original agreement (supported by *Masters v Cameron*[16] and by Lloyd LJ in *Pagnan S.p.A v Feed Products Ltd*[17].

Application to facts

ECNZ submitted that the HoA was incomplete, and relied on four terms in the HoA which were stated to be "not agreed" or "to be agreed". In ECNZ's submission these four references indicated that the parties had reserved them for later agreement. These terms were:

- Liability for non-delivery (the K factor):

  The K factor was part of a formula limiting FCE's liability for non-delivery of gas or alternative fuel (other than due to force majeure or a willful act).

  The wording of the clause, "to be agreed", was evidence that the parties did reserve the K factor in the negotiations. In evidence, there was agreement among the experts that the K factor was capable of accurate and objective measurement following liable non-delivery, but not earlier. The business sense in leaving measurement till later, the urgency in signing the HoA and the fact that the K factor was not essential to the efficacy of the HoA (the clause limited FCEs liability for losses for non-

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11 (1998) 18 NZULR 77.
12 Section 204 *Restatement (Second) of Contracts.*
13 [1976] 2 NZLR 495 (CA).
14 [1964] SC 308.
15 [1987] Columbia Law Review 217, 250.
16 (1954) 91 CLR 353, 360.
17 [1987] 2 Lloyds Rep. 601, 619.

delivery more than the general law) led the Court to hold that the HoA was complete and workable in respect of the "to be agreed" K factor.

- The "additional clause to cover non-supply liabilities" provision:

  Because the parties regarded this clause as non-contentious and because they did not attempt to reach agreement, this clause did not make the HoA unenforceable.

- Force Majeure:

- The force majeure provision in the HoA included the phrase "Not agreed: Extension to National Grid". Wild J held that the clause recorded agreement upon force majeure except in respect of extension to the national electricity grid. This was supported by evidence. Furthermore, he held that even if ECNZ was correct in its submission that the clause recorded the lack of any agreement on force majeure, this would not affect the workability of the HoA. The Court found that a force majeure clause, whilst usual in a long term gas supply contract, is not necessary to its workability because, in the absence of a force majeure clause, risks are allocated by the general law of the doctrine of frustration of contract.

- Prepaid gas relief:

  The Court held that while this type of clause is invariably found in gas supply contracts (it re-allocates the relevant risks) its effective absence from the HoA did not render the HoA unworkable. Such a clause would give ECNZ the agreed relief. Without such a clause ECNZ is not entitled to that relief but the absence of such a provision does not render the balance of the HoA unworkable.

ECNZ also contested that other crucial terms were incomplete, in that they required further agreement between the parties. The terms the Court examined were -

- Notifications (nominations and MHQ):

  The Court accepted that the maximum delivery obligation and notifications terms read together were workable even in their present form. The Court noted however, that the parties contemplated fuller terms and that failing agreement, the Court would supply those fuller terms, using comparable clauses in an existing gas supply agreement between the parties as a guide to what is reasonable.

- Dispute resolution:

  There was no dispute resolution clause in the HoA. Wild J held that a dispute resolution clause is merely "desirable rather than necessary". His Honour stated that if a dispute arose and the parties were unable to agree upon a means of resolving it then the parties could go to the Court.

Were the terms of the HoA sufficiently certain to be enforceable?

Having found that the parties intended to be bound by the HoA and that it was a complete contract containing agreement on all essential terms, Wild J then turned to the certainty (or otherwise) of the terms of the HoA.

Wild J started the analysis by outlining the following legal principles:

- The HoA will fail for uncertainty if the Court cannot place upon its necessary terms one sensible and definite meaning upon which the Court can safely act (the classic statement of Lord Wright to that effect in *G. Scammell and Nephew Limited v Ouston* [18].

- If the words of the HoA permit one sensible meaning, then there is no need to go further. However if the words are not so clear and give rise to more than one sensible meaning, the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. Having attempted this exercise, in some cases it may simply remain impossible to give the words any sensible meaning at all in which case they are either ignored (not treated as forming part of the contract) or, if of apparent central importance, treated as demonstrating that the parties never made an agreement at all (*Vitol B.V. v Compagnie Europeene des Petroles*[19]).

- Wild J adopted the comment of Rogers CJ in *Banque Brussels Lambert v. Australia National Industries Ltd*[20]. "The whole thrust of the law today is to attempt to give proper effect to commercial transactions. It is for this reason uncertainty, a concept so much loved by lawyers, has fallen into disfavour as a tool for striking down commercial bargains." Wild J refused to adopt the negative approach of setting out to find uncertainty.

- The Court could imply terms into the HoA to overcome any uncertainty defects, provided they met the five point test laid down by the Privy Council in *BP Refinery (Western Port) Pty Limited v President, Councillors & Ratepayers of the Shire of Hastings*[21].

- Ambiguity is not to be confused with uncertainty. In contract law, ambiguity arises where a contract is capable of two or more definite and sensible meanings. Uncertainty arises when a contract is not capable of any definite or sensible meaning.

- Uncertainty will not render a contract unenforceable unless it affects a term necessary to the workability of the contract. If the uncertainty vitiates only an inessential term, then the Court may disregard that term and enforce the remainder of the contract.

Application to the facts

Wild J then applied these principles to a number of provisions which ECNZ alleged were so uncertain as to render the HoA not binding. The particular provisions and the Court's analysis of the evidence are confined to their own facts but the principles enunciated by Wild J enabled him to either resolve the alleged uncertainties or conclude that they did not render the contract unworkable.

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18 [1941] AC 251, 268.
19 [1988] 1 Lloyd's Rep 574, 576.
20 (1989) 2 NSWLR 501,523.
21 (1977) 16 ALR 363, 376.

DID ECNZ FAIL TO MEET THE "ALL REASONABLE ENDEAVOURS" OBLIGATION TO AGREE A FULL SALE AND PURCHASE AGREEMENT?

Having reached the conclusions outlined above, Wild J considered whether it was necessary to address this question, but did so anyway. The relevant clause provided "FCE/ECNZ to use all reasonable endeavours to agree a full sale and purchase agreement within three months of the date of this agreement."

The Court detailed the following legal principles:

- "All reasonable endeavours" is probably a middle position implying something more than reasonable endeavours but less than best endeavours (*UBH (Mechanical Services) Ltd v Standard Life Assurance Co*)[22].

- A party obliged to use "reasonable endeavours" may take into account its own commercial interests, and other pertinent factors, for example the cost and uncertainties of any proposed litigation, and the expense to them occasioned by the fulfillment of all reasonable endeavours (*UBH and Phillips Petroleum Co. UK Ltd v Enron Europe Ltd)*[23].

- A covenant to use "best endeavours" or "all reasonable endeavours" to some definite end is enforceable, provided it is sufficiently clear and certain what is to be done. The position was put simply by Millet LJ in *Little v Courage Ltd*[24]:

> "An undertaking to use one's best endeavours to obtain planning permission or an export licence is sufficiently certain and is capable of being enforced. An undertaking to use one's best endeavours to agree, however, is no different from an undertaking to agree, to try to agree, or to negotiate with a view to reaching agreement; all are equally uncertain and incapable of giving rise to an enforceable legal obligation."

Application to facts

Wild J held that the all reasonable endeavours obligation in the HoA was sufficiently clear and certain to be legally enforceable. On an analysis of the evidence he considered that ECNZ was in breach of that obligation. ECNZ had not used all reasonable endeavours to reach full agreement, but rather endeavoured first to negotiate a different agreement, and subsequently to get out of any agreement.

CONCLUSION

The Court made a declaratory order that the HoA was a valid and binding contract for the sale and purchase of gas. It also decided that ECNZ breached its obligation to use all reasonable endeavours to agree a full sale and purchase agreement. ECNZ has since announced its intention to appeal the decision.

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22 QBD, The Times Law Reports 13 November 1986.
23 CA (Civil Division) UK unreported, 10 October 1996.
24 (1995) 70 P & CR 469, 476.