COURTNEY & FAIRBAIRN LTD. v. TOLAINI BROTHERS (HOTELS) LTD.:

BUILDING CONTRACT — AGREEMENT TO NEGOTIATE A FAIR AND REASONABLE PRICE

In *Courtney & Fairbairn Ltd.* v. *Tolaini Brothers (Hotels) Ltd.*[1] the courts were again faced with the problems which are created where a contract expressly provides for further negotiation or agreement between the parties. The principal difficulty in cases of this type is that of reconciling expressions of contrary intention to be bound. To take a typical example, a contract may fix terms of importance and then provide that the price is "to be agreed". In relation to the price term, the parties have expressed an unwillingness to be bound at the time of contracting and a wish to settle the term at some time in the future. However, it is important to observe that in relation to all the other terms there is an intention to be bound immediately.

The usual way in which the courts have attempted to resolve these expressions of contrary intention has been to direct their attention exclusively to the terms which are "to be agreed" and give effect to that intention "not to be bound" in relation to those terms. The result of this approach is, of course, that the intention to be bound to the other terms is defeated because the courts hold that no contract is formed. In *Courtney's* case, for example, it was said by Lord Denning M.R., who delivered the leading judgment, that "There is no machinery for ascertaining the price except by negotiation. In other words, the price is still to be agreed. Seeing there is no agreement on so fundamental matter as the price, there is no contract".[2]

It is now proposed to look at the facts which created the problem in *Courtney's* case. The plaintiffs were building contractors. As a result of discussions with the defendants, who were interested in developing a building site, it was proposed that Mr Courtney, the managing director of the plaintiff company, should introduce the defendants to someone willing to provide finance for the development. The defendants were to develop the site but they were to employ the plaintiffs to do the construction work. After these discussions the plaintiffs wrote to the defendants informing them that they were now able to introduce someone who had the necessary finance and, if their introduction led to a suitable financial arrangement, they asked whether "you will be prepared to instruct your quantity surveyor to negotiate fair and reasonable contract sums in respect of each of the three projects as they arise" (based upon an agreed estimate of net cost and overheads with a 5 percent profit margin). In reply the defendants agreed in writing to "the terms specified therein". A quantity surveyor was then appointed by the defendants but there were differences of opinion about the price of the construction work and negotiations broke down between the parties. The defendants employed another firm to do the construction work but they did, however, take advantage of the finance which had been made available to them through the plaintiffs' introduction.

1 [1976] 1 W.L.R. 297.

2 Ibid., 301.

At first instance Shaw J., on a preliminary point of law, gave judgment for the plaintiffs, holding that there was an enforceable contract whereby the defendants undertook to employ the plaintiffs to carry out the construction work "at a price to be calculated by the addition of 5 percent to the fair and reasonable cost of the work and the general overheads relating thereto". This decision was reversed on the grounds that the price had not been fixed by the parties.

It is most unfortunate that there is no report of the judgment of Shaw J. The interesting and significant thing about the decision is the apparent willingness of the court to find evidence of an intention to be bound by reference to the terms upon which the parties had agreed. These, possibly taken together with the conduct of the parties in relation to the financial arrangements (the finding of the finance by the plaintiffs and its use by the defendants) must have been regarded as evidence of an intention to be bound. On the other hand, much less emphasis appears to have been attached to the fact that the contract expressly provided that the price was to be negotiated. Shaw J. seems to have had no difficulty in fixing the price term for the benefit of the parties in accordance with the provisions contained in the contract no doubt assisted by the fact that the price term itself used an expression which supplied an objective standard: "fair and reasonable contract sums." It is submitted, with respect, that Lord Denning M.R. placed too much emphasis upon the unsettled price term and not enough upon the terms which were fixed as evidence of an intention to be bound. It is therefore submitted that Shaw J. was correct and that the contract ought to have been upheld.

In a recent article it is stated[3] that ". . . *Courtney* was concerned with an entirely separate contract to negotiate . . . ." and the authors use this concept of a "separate contract to negotiate" to distinguish *Courtney's* case from *Mallozzi* v. *Carapelli*[4] where the contract provided that the port of discharge was to be agreed between the parties. In the authors' view *Mallozzi* v. *Carapelli* can be distinguished on the grounds, inter alia, that it was concerned with "a term within an otherwise fully enforceable contract".[5] It is submitted, however, that it is quite misleading to describe the contract in *Courtney's* case as a "separate contract to negotiate". This phrase suggests an arrangement in which all or most of the terms of importance are to be negotiated in the future. This was certainly not the situation in *Courtney's* case where only the price term was required to be fixed. In this respect, *Courtney's* case is exactly the same as *Mallozzi* v. *Carapelli* and the only difference is the relative importance of the terms which were to be settled in the future by the parties. Neither case can properly be described as an example of a "contract to negotiate".

Lord Denning M.R. considered the alternative argument of the plaintiffs that there existed a "contract to negotiate" which the court should enforce. This argument was rejected on the grounds that this ". . . is not a contract known to the law".[6] The refusal of the court in *Courtney's* case to recognise the "contract to negotiate" has pro-

3 Dugdale and Lowe, "Contracts to Contract and Contracts to Negotiate" [1976] J.B.L. 28, 31.
4 [1975] 1 Lloyd's Rep. 229.
5 Supra, n. 3.
6 [1975] 1 W.L.R. 297, 301.

duced critical comment and the view has been expressed that there is ". . . neither authority nor satisfactory reason in principle for refusing to recognise a separate enforceable contract to agree or to negotiate".[7] The arguments in favour of giving effect to a contract to negotiate are attractive. They were, however, canvassed in the articles referred to and it is not proposed to consider them in this note.

It is interesting to observe that both articles agreed with the court's view of the building contract. It is, however, a great pity that the possibility of upholding the contract itself was dismissed without apparently meriting any discussion. It is submitted that this is an alternative which requires consideration and the better opinion may be that, whatever might be the attractions of developing the concept of a "contract to negotiate", there is room for the view that the contract in *Courtney's* case should have been upheld.

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7 Dugdale and Lowe, supra, n. 3, 35. Cf. Hammond, "Contracts to Negotiate?" [1976] N.Z.L.J. 153 where very similar views are expressed.