

## NEGOTIATE IN GOOD FAITH\*

***Wellington City Council v Body Corporate 51702*** (Court of Appeal, New Zealand, 7 August 2002 CA 264/01)

*Negotiate in good faith – Process contract enforceable?*

### **Background**

The Wellington City Council is appealing from a High Court judgment which held that Council had breached what the High Court judge had called a “process” contract.

### **Facts**

The respondent was wishing to purchase the freehold of a rental property. The respondent had some detailed discussions with Council and Council wrote the respondent a letter which under the heading “process” the Council wrote: “Council officers will negotiate, in good faith, sales of Council’s leasehold interests to existing lessees at not less than the current market value of those interests”.

The High Court found that the Council had offered to negotiate in good faith, which the respondent accepted by its conduct in entering into negotiations on that basis. Each party provided consideration to the other by their mutual exchange of promises. The High Court found that a legally enforceable “process” contract had been made. The respondent argued that the High Court had been correct in holding that an enforceable “process” contract came into existence in these circumstances. The Council appealed.

### **Judgment**

The Court of Appeal disagreed with the High Court. The appeal reviewed the New South Wales Court of Appeal case of *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*<sup>1</sup> and the UK House of Lords case of *Walford v Miles*<sup>2</sup> in some detail. The court, reiterated that for their to be an enforceable contract the parties must have reached consensus on all essential terms or at least an objective means of sufficient certainty by which those terms may be determined. The court believed that the same theory of consensus applies by analogy to a process contract that provides all parties to negotiate in good faith. The Court of Appeal held that “good faith” in this context is essentially a subjective concept, as the House of Lords pointed out in *Walford*. There is thus no sufficiently certain objective criterion by means of which the Court can decide whether either party is in breach of the good faith obligations. The court accepted that in some circumstances a process contract is enforceable. The court in those cases requires the parties to follow agreed procedure. However the present commitment to act in “good faith” was insufficiently definitive of the parties obligations and therefore unenforceable.

## PRE-EMPTIVE RIGHTS

***R J Ord and C M Fenton v Calan Healthcare Properties Ltd*** (High Court of New Zealand, unreported, 23 December 2003 CIV 2003-404-5297)

*Pre-emptive rights – Meaning of the word “transfer” – Change of trustee triggering the same*

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\* David Quigg LLB(Hons), LLM and Matt Yates LLB BA, Quigg Partners, Wellington, New Zealand.

<sup>1</sup> (1991) 24 NSWLR 1.

<sup>2</sup> [1992] 2 AC 128.

**Background**

Calan Healthcare Properties Limited had a corporate shareholder, CIML, who owned two-thirds of the shares in Calan and wish to acquire the rest. The rest were held by a family trust, the Crucible Trust.

**Facts**

The Crucible Trust appointed a new trustee and then one of the existing trustees retired. In order to bring the status on the register up to date the trustees executed a share transfer transferring the relevant shares from the old trustees to the new trustees.

The Constitution of Calan provided:

“A shareholder intending to transfer any shares (‘the Transferor’) must give a transfer notice in writing to the Board. The transfer notice shall state the number, class and asking price of the shares to be offered for sale. The transfer notice shall constitute the Board the Transferor’s agent (to the exclusion of the Transferor) for the sale of the shares.”

CIML argued that the transfer from one set of trustees to the other was caught by the plain meaning of the pre-emptive provision.

**Judgment**

The High Court judge agreed. The judge considered the constitutional context, the company law context, and the purpose underlying pre-emptive provisions. The court noted a series of English cases that had consistently held the transfer of the beneficial interest in shares does not trigger pre-emptive rights in the constitutional provisions fundamentally similar to the Calan’s ones. None of the cases dealt directly with the converse, but that would seem a necessary corollary.

The High Court held any transfer of shares was one trustee to another is caught by the pre-emptive provisions.

**Commentary**

The judge highlighted that if companies wish to avoid this “undesirable” consequence then it was in the hands of the draftperson to ensure that company constitutions did not catch such transfers if unintended.

**JOINT VENTURE\***

*Opus International Consultants Ltd v Projenz Ltd* (High Court of New Zealand, unreported, 12 August 2003 CIV-2003-485-1387)

*Joint venture – Injunction application – Alleged breaches – Sale of alleged breaches interest*

**Background**

Opus International Consultants Limited and Projenz Limited were parties to a joint venture agreement. The joint venture had been established to tender for and undertake a roading contract with the Manukau City Council. The joint venture agreement defined the terms of the venture as the roading contract with the Council and “associated work arising out of” that contract.

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\* David Quigg LLB(Hons), LLM and Matt Yates LLB BA, Quigg Partners, Wellington, New Zealand.